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UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1902.

BANKERS MUTUAL CASUALTY COMPANY,
PLAINTIFF IN ERROR

vs.

THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, DEFENDANT IN ERROR.

In Error in the United States Circuit Court for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

HORATIO F. DALE, WILLIAM CONNOR, A. U. QUINT and G. W. BOWEN, Counsel for Plaintiff in Error.

ALFRED H. BRIGHT, Counsel for Defendant in Error.

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ARRANGEMENT OF BRIEF OF PLAINTIFF IN ERROR.

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We hereby certify that the cost of printing this argument is $101.00 and has been paid by the Plaintiff in error the Bankers Mutual Casualty Company.

A. U. Quint.

BRIEF OF PLAINTIFF IN ERROR.

DIVISION I.

STATEMENT OF THE CASE.

The ultimate facts disclosed by the record are that a duly registered letter containing three thousand dollars was carried along the line of railroad belonging to defendant in error from Minneapolis, Minnesota, to Harvey, North Dakota, an intermediate station distant less than 80 rods from a postoffice; and said registered letter, contained in a locked mail sack, about eleven o'clock at night was there delivered to one Magson, the night station agent of defendant in error and the proper employe of defendant to receive same, whose duty it was to care for the said mail during the night and deliver same into the postoffice the following morning. That thereafter and during said night said mail sack and its contents were in the exclusive custody of said defendant in error and said Magson its proper employe and while said mail sack containing said registered letter was in such care and custody, and by reason of the negligence of the defendant in error and of said Magson as alleged in the complaint, a third person by means of a forged or false key stole the registered letter from said mail sack; and plaintiff in error brought this action to recover the three thousand so lost.

The questions thus presented for determination in this case are as follows:

1st. Do the provisions of the statutes of the United States make a railway company carrying the mail upon notification from the Second Assistant Postmaster General liable to the owner for a loss of registered mail matter occasioned by the default, negligence or misfeasance of its ordinary private agent or employe, while said registered mail was in the exclusive care and custody of said railway company and its employ?

2d. Is section 1023, Postal Laws and Regulations, Ed. 1893, a valid rule, so that defendant in error was under obligation upon receiving the mail "at a late hour of the night to retain custody thereof by placing same in a secure and safe room or apartment of the depot or station until the following morning"?

3d. Does section 713 of Postal Laws and Regulations, 1893, control the relations of the defendant in error and the employe, Magson, in regard to the mail, and fix their status as employer and employe?

4th. Is section 713 of Postal Laws and Regulations, 1893, a valid rule, properly within the powers of the Postmaster General to establish?

5th. If, under such circumstances, the railway company is exempt from the operation of the rule of respondeat superior, is defendant in error liable as a principal, for the loss of the registered package in question, under the facts and circumstances set out in complaint?

6th. Is the defendant liable under the rule of respondeat superior for loss due to its private employe, Magson?

The facts and record set out more fully are as follows:

Plaintiff in error, an Iowa corporation, as plaintiff in the trial court on or about the 30th day of October, A. D. 1901, filed in the United States Circuit court for the district of Minnesota a substituted complaint and afterwards filed an amendment thereto. Said complaint as amended alleged in substance:

That during the period referred to in the complaint, defendant in error, the original defendant, herein referred to as the "Soo" Railway Company, was carrying the mail under the statutes of the United States, and the rules and regulations adopted by the postoffice department, upon notification from said department, for a compensation as fixed by said department, of $64,815.47 per year on the division of its road with which this case is concerned, for furnishing postal cars and for carrying the mail and the persons in charge thereof.

That there was no contract of any kind existing between said "Soo" Railway company and the United States, for the carriage of mail and the persons in charge thereof.

That postal regulation adopted in 1893, No. 713, was then in force, that Harvey, North Dakota, is an intermediate station, with its postoffice less than eighty rods from the depot of the defendant in error, and that James Magson was the employe of defendant in error. A copy of postal regulation No. 713 is set out in the third division of this brief.

Said complaint further alleged in substance:

That on or about November 10, 1900, the Metropolitan Bank, a Minnesota banking corporation, deposited for registration with the postmaster at Minneapolis, Minnesota, with letter postage and registration fee duly prepaid thereon, a package containing United States currency in the amount and of the value of $3,000.00, addressed to the German State Bank, a banking corporation at Harvey, North Dakota, and the same was duly registered. Said registered package was duly transported over defendant's line of railway through the states of Minnesota and North

Dakota to Harvey in a postal car belonging to said railway company. That the mail sack or pouch containing said registered package while in said postal car was under the exclusive control of United States postal clerks.

Also: That upon reaching the depot at Harvey, between the hours of eleven and twelve o'clock at night, the mail sack or pouch containing said registered package, duly locked, was delivered by a postal clerk on said mail car to said James Magson, the night station agent of defendant in error at Harvey, and said mail sack containing said registered package was by said night station agent taken into the depot at Harvey and hung up on the wall, or placed on the floor of said depot. That said mail sack continued in the care and custody of said night station agent during said night until delivered on the following morning to the postmistress at Harvey.

Also: That during the night said registered package was stolen through the negligence of said railway company and its said night station agent by some person who obtained access to said mail sack by means of a key which would open the same, and when the same was delivered to said postmistress at Harvey said mail sack was intact and was duly locked, but said registered package was not contained therein.

Also: That one Soule, a roadmaster or foreman in the employ of defendant in error, caused a key to be made which would unlock said mail sack, and said Soule or other person gained entrance to said depot through the negligence of said defendant and of its said night station agent Magson, and said Soule or other person unlocked said mail sack, took said package therefrom, and stole said $3,000.00 in currency.

That it was the duty of said railway company to provide a sufficient and safe receptacle or place for the safety and security of said mail sack and its contents while in its custody; but neglecting its duty in the premises, said railway company wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of the same, and also failed to provide any separate room, closet or other safe receptacle capable of being securely fastened by lock and key or otherwise, in which to keep said mail sack safely against any intruder or unauthorized person, but said railway company in fact kept said mail sack in a room which was not designed for or capable of safely keeping valuable articles or property.

Also: It was also the duty of said railway company to safely care for and guard said mail sack and its contents

during the night and to place the same in the actual custody of a competent and diligent person duly sworn into the postal service of the United States and to safely deliver said mail sack and its contents, including said registered package, to the postmistress at the said postoffice in said town of Harvey.

Also: That in each and all of the foregoing matters, and in permitting an unsworn person, its said night agent Magson, to handle said mail sack, said railway company failed to perform or discharge its duty and was negligent in each of said respects, whereby said registered package was wholly lost to the owner thereof and said owner was thereby damaged in the sum of three thousand dollars.

That it was the duty of said night agent of said railway company to safely care for and guard said mail sack and its contents during the night, and to thereafter safely deliver the same postmistress at the postoffice in said town of Harvey, in all of which respects defendant's said night agent negligently failed. That while said mail sack and its contents were in the exclusive care and custody of said defendant in error and its night station agent Magson one Soule or other person, through the negligence of said night station agent, gained access to said room and to said mail sack and took from said mail sack the registered package in question and the currency therein contained, whereby said registered package was wholly lost to the owner thereof, and said owner was thereby damaged in the sum of three thousand dollars. That by reason of the negligence of the night agent as aforesaid said railway company is liable for the loss of said registered package.

Said complaint further stated that said Casualty company had insured said German State Bank against loss of the currency contained in said registered package while in the course of transmission in the registered mail, and a copy of the policy issued by said Casualty company is attached to the complaint. That said German State Bank was the owner of said currency at the time the same was lost, and proof of said loss and the interest of said bank was duly made and the full amount of said loss was paid by said Casualty company to said bank. That said Casualty company become and was thereby fully subrogated to all the rights of said bank against said railway company, and as further evidence of said subrogation an assignment in writing of said package of currency and of the claim of said bank thereto, and of its cause of action, was duly made by said bank to said Casualty company, and

a copy thereof is attached to the complaint as a part thereof.

Said Casualty company prayed for judgment against said railway company for the sum of three thousand dollars ($3,000.00) with interest and costs.

A demurrer filed to said complaint as amended was sustained on the 20th day of December A. D. 1901, by Hon. Wm. Lochren as Circuit Judge, on the ground that the same does not state facts sufficient to constitute a cause of action, which said ruling was duly excepted to. Plaintiff having elected to stand upon its complaint as amended, judgment was then entered upon the merits dismissing said case and in favor of the defendant for costs which said judgment was duly excepted to. All of the foregoing was duly entered of record.

The two opinions of the trial court in making its ruling on the demurrers filed to the original and to the substituted comlpaint are set out in the printed transcript of record filed in the Eighth United States Circuit Court of Appeals on pages 26–30, and on pages 42–43. The first opinion is contained in 113 Fed. 414.

Said case was then carried in error, to the United States Circuit Court of Appeals for the eighth circuit where the judgment below was affirmed on the 14th day of July A. D. 1902, and a final judgment was entered therein against plaintiff in error for costs. The opinion of the Circuit Court of Appeals filed in said court and cause is contained in the record (page ——) and reported in 117 Fed. 434.

A writ of error was duly allowed from this court to said Circuit Court of Appeals, by Hon. David J. Brewer, Associate Justice of this court, and said writ of error duly issued from the office of the clerk of this court on the 18th day of September, A. D. 1902.

The return to said writ, including the transcript of the record, together with the citation duly served on counsel for defendant in error, were duly made and filed in this court, in the time and manner provided by law.

DIVISION II.

SPECIFICATION OF ERRORS.

The ultimate questions of law presented by the record and the assignments of error, upon which plaintiff in error relies are as follows:

First. The Circuit Court and the Circuit Court of Appeals each erred in construing the statutes of the United States in regard to carrying the mails, especially section 4000 of the Revised Statutes of the United States, and section 1023 of the Postal Laws and Regulations, 1893, and holding that the defendant in error is not liable by reason of said statutes to care for and carry the mail safely.

Second. The Circuit Court and the Circuit Court of Appeals each erred in construing the Postal Laws and Regulations, 1893, including section 713, and holding same a nullity, and that notwithstanding said regulation the railroad employe, Magson, was a government agent in so far as he cared for, or handled the mail.

Third. The Circuit Court and the Circuit Court of Appeals each erred in ignoring the regulations of the Postmaster General, including section 713, Postal Laws and Regulations, 1893, and in treating same as void, and of no effect, and in overruling the said regulation of the Postmaster General.

Fourth. The Circuit Court and the Circuit Court of Appeals each erred in contravening the authority of the Postmaster General as set out in sections 713 and 1023 of the Postal Laws and Regulations, 1893, and by virtue of which, in the matters involved in this action, the agent, Magson, is to be held to be the employe of defendant in error, and not a government agent.

Fifth. The Circuit Court of Appeals and the Circuit Court each should have held that defendant in error as a railway company, acting under the statutes of the United States and under section 713 of the Postal Rules and Regulations, and having the exclusive care and custody of the United States mail sack containing the registered package in question, under the facts and circumstances shown in the complaint, at its station at Harvey, North Dakota, where it had an agent or representative employed, said station being less than eighty rods from an intermediate postoffice, was liable to the owner of such registered package for said company's failure to perform its statutory ob-

ligation or duty to safely care for said mail sack and its contents and that said company was liable for the consequent damage caused to such owner through the loss of such package by reason of the negligence of the ordinary unsworn agent or representative of said company; and each of said courts erred in refusing to so hold and decide.

Sixth. The Circuit Court of Appeals and the Circuit Court each should have held that defendant in error, as a railway company, acting under the statutes of the United States, and under section 713 of the Postal Rules and Regulations, and having the exclusive care and custody of the mail sack and the registered package therein contained, under the circumstances shown in the complaint, was a mere private corporation for pecuniary profit, and subject to the rule of *respondeat superior* as to such mail, and would be liable therefor if lost through the negligence of its ordinary unsworn agent or representative; and each of said courts erred in refusing to so hold and decide.

Seventh. The Circuit Court of Appeal and the Circuit Court each erred in holding that a railway company carrying the mail, under the facts alleged in the complaint, and its ordinary unsworn employee while engaged in such service, are respectively a principal public agent, and a subordinate public agent or employee, of the United States.

Eighth. Each of said courts erred in holding that a railway company, carrying the mail in connection with its ordinary business as a carrier, under the facts alleged in the complaint, was a principal public agent of the United States; and also erred in holding that the ordinary unsworn employee of said railway company, while engaged in caring for the mail in connection with his ordinary duties as such employe, was a subordinate public agent or employe of the United States.

Ninth. The Circuit Court of Appeals and the Circuit Court each erred in holding that Magson was not the private unsworn agent or employee of defendant in error but was a public agent or employe in the postal service of the United States, when caring for mail delivered to him under Sec. 713 of the postal regulations of 1893; and erred in refusing to give effect to the part of said regulation providing that persons so employed by said companies are agents of the companies and not employes of the postal service.

Tenth. Each of said courts erred in holding that a railway company carrying the mail in connection with its ordinary business as a carrier, under the facts alleged in the complaint; was exempt from liability for a loss of mail

caused by the negligence of its ordinary unsworn employee having the care and custody of the mail in connection with his usual duties as such employee, and in giving to said railway company, in effect, the same exemption from liability which a public officer is entitled to for the default, negligence or misfeasance of his subordinate in the public service.

Eleventh. Each of said courts erred in holding that a railway company carrying the mail is, in effect, a public officer of the United States, and also erred in holding that an ordinary unsworn employee of such railway company, when concerned in the carriage of the mail, is, in effect, a subordinate public agent or employee of the United States.

Twelfth. Each of said courts erred in holding that the complaint as amended did not state a cause of action against said railway company, considered as a principal public agent, for its own negligence in failing to provide a sufficient and safe place and a proper and competent person for the safe care and custody of mail while in its actual care and custody.

DIVISION III.

THE CONSTITUTION STATUES OF THE UNITED STATES AND THE RULES AND REGULATIONS OF THE POST OFFICE DEPARTMENT.

The provisions of the United States Constitution and and statutes and the rules and regulations of the Post Office Department which plaintiff in error presents as controlling in this case are as follows:

CONSTITUTION OF THE UNITED STATES: Art. 1, Sec. 8, Par. 7, of the Constitution provides: The Congress shall have power * to establish Post Offices and Post Roads.

THE STATUTE OF THE UNITED STATES PROVIDES:

R. S. SEC. 3964: The following are established as post roads. * All railroads or parts of railroads which are now or hereafter may be in operation.

R. S. SEC. 3695: The Postmaster General shall provide for carrying the mail on the post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

ACT. OF MARCH 3, 1879, SEC. 3: The Postmaster Genenral shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed.

SAME ACT. SEC 33: * and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed. (*20 Stat. L. 355, ch. 180; 1. Supp. p. 246.*)

R. S. SEC. 4000: Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

The original enactment provided for the Registered mail system was as follows:

R. S. SEC. 3926: For the greater security of valuable mail matter, the Postmaster General may establish a uniform system of registration. But the Post Office Department or its revenue shall not be liable for the loss of any mail matter on account of its having been registered.

The subsequent act on the same subject is as follows:

ACT OF FEBRUARY 27, 1897, SEC. 3926: For the greater security of valuable mail matter the Postmaster General

may establish a uniform system of registration, and as a part of such system he may provide rules under which the senders or owners of first class registered matter shall be indemified for losses thereof in the mails, the indemnity to be paid out of the postal revenues, but in no case to exceed ten dollars for any one registered piece, or the actual value thereof when it is less than ten dollars, and for which no other compensation or reimbursement to the loser has been made:

Provided, that the Postoffice Department or its revenues shall not be liable for the loss of any other mail matter on account of its having been registered.

R. S., SEC. 4026: The Postmaster General may appoint clerks for the purpose of assorting and distributing the mail in railway postoffices, each of whom shall be paid out of the appropriation for transportation of the mail (at rates stated).

ACT OF MARCH 3, 1887: That the Postmaster General be, and he is hereby authorized to employ such mail-messenger service as may be necessary for the carriage of the mails in connection with railroad and steamboat service, transfer service between depots, over bridges or ferries, between postoffices, postoffice and branch offices or stations, in cases where by the laws and regulations of the Postoffice department, railroad companies, steamboat companies, and the masters of vessels are not required to deliver into and take from the postoffices the mails carried on their lines or vessels. (*24 St. L. 492, Ch. 346; 1 Supp. p. 557.*)

POSTAL REGULATIONS: The following postal regulation was adopted by the Postmaster General in the year A. D. 1893, and was in force at the time in question in this case, towit:

SEC. 713. Every railroad company is required to take the mails from and deliver them into all terminal postoffices; whatever may be the distance between the station and the postoffice, except in cities where other provisions for such service are made by the department. In all cases where the department has not made other provision, the distance between terminal postoffices and nearest station is computed in, and paid for as part of the lenghth of the route.

The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.

The department will provide for the carrying of mails to and from intermediate postoffices and postal stations

located not more than 80 rods from the nearest railroad office or station; and also to and from intermediate postoffices and postal stations located 80 rods or less from railroad office or station when the railroad company has no agent employed at such office or station. In all cases the distance between railway office or station and the postoffice or postal station must be measured by the shortest practicable road open to public travel, At all points where the department deems the exchange of mails necessary the speed of trains must be slackened so as to permit the exchange to be made in safety.

At places where the railroad companies are required to take the mails from and deliver them into postoffices or postal stations the persons employed by the railroad companies to perform such service are agents of the companies and not employees of the postal service and need not be sworn as employees of such service; but must be more than sixteen years old and of suitable intelligence and character.

Postmasters will promptly reprt to the proper division superintendent of the railway mail service or the general superintendent thereof any violation of this requirement.

SEC. 1023, POSTAL LAWS AND REGULATIONS, ED. 1893: Whenever the mail on any railroad route arrives at a late hour of the night the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station until the following morning, when it must be delivered at the postoffice.

Note: This mail in suit arrived at Harvey, North Dakota, about eleven o'clock at night.

POSTAL OATH. ACT. OF MARCH 5, 1874, SEC. 15: That before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any state or territory, the following oath or affirmation:

"I, A. B., do solemnly swear (or affirm, as the case "may be) that I will faithfully perform all the duties re- "quired of me and abstain from everything forbidden by "the laws in relation to the establishment of postoffices "and post roads within the United States; and that I will "honestly and truly account for and pay over any money "belonging to the said United States which may come into "my possession or control.

"And I also further swear (or affirm) that I will sup- "port the Constitution of the United States, so help me "God." *(18 Stat. L. 19, Ch. 46; 1 Supp. p. 5.)*

DIVISION IV.

JURISDICTION OF THIS COURT IN ERROR.

The record shows that this case was commenced in the United States Circuit court for the district of Minnesota, taken thence in error to the Eighth United States Circuit Court of Appeals, and brought from that court in error to this court.

The record also shows that there was diverse citizenship of the parties, but the jurisdiction of the circuit court did not depend entirely on that ground. as the case also involved the construction and application of the statutes of the United States relating to the carriage of the mail by railway and of Postal Regulations including sections No. 713 and 1023 Ed. 1893, concerning the duty of a Railway Company to receive mail carried along its line of Railroad, to care for and deliver it into the local Post Office, at intermediate stations where the distance between the Railway Station and the Post Office is less than 80 rods, a fact shown to exist in the case at bar.

And making the employe of the railway so doing this service, for and on behalf of the railway, the private employee of the railway, and not a Government employee or agent.

The question of the duty of the postmaster, under the Federal Statutes. and his liability for violation of such duty, was considered by this Court on writ of error to the New York Court of Appeals in *Teal vs. Felton* (*12 Howard, 284*). This is clearly a precedent for the jurisdiction of this Court in the case at bar, as the question to be determined is identical with the Teal case.

The decisive questions in this case turn upon the construction of, and effect to be given to Statutes of the United States, and Postal Laws and Regulations applicable to the matters involved. If these are held to be valid then the other propositions of law follow as corollary therto, but not as the basic questions of the case.

It seems to plaintiff in error that the relations between the defendant in error, and its employee, Magson, are fixed and effectively defined by Section 713, Postal Laws and Regulations, ed. 1893, and the provisions of that regulation should have been followed by both the Circuit Court and the Circuit Court of Appeals. The decision improperly sets same aside as counting for naught, while we believe it

is a valid order of the Postmaster General, binding upon the defendant in error. It is apparent that the construction and weight to be given to this regulation, and the powers of the Postmaster General involved therein, is a basic question in this case. Even conceding the common law to be as held by the courts below, still if these Statutes and Postal Laws and Regulations are valid, having the force of statute, then the relations are by virtue of these statutory provisions, as we aver, and not as defined by the courts below. As a matter of course, in law, if Magson was, as this regulation provides, the employee of the defendant in error, then it is liable under the rule of respondeat superior, while if this regulation is invalid, then it has no weight in the case, and its provisions might not make the rule of respondeat superior apply. While the rule of respondeat superior is a common law question, the power of the Postmaster General, and the validity of this regulation, which is the question under discussion, is one of statute of the United States, and the power of a department of the Government thereunder.

The duties of the railroad to carry the mails safely is involved in, and depends upon the construction of the Acts of Congress, defining their duties, especially Section 4000 of the Revised Statute of the United Stated, and the Postal Laws and Regulations, including Section 1023, ed. 1893.

The Statutes of the United States, quoted in Division Three of this brief, are construed by the Circuit Court, and Circuit Court of Appeals, and they hold that they do not create a statutory duty charging the defendant in error to carry the mail safely. Section 1023, Postal Laws and Regulations, Ed. 1893, reads: "Whenever the mail on any railroad route arrives at a late hour of the night, the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station until the following morning, when it must be delivered at the postoffice." Each of the lower courts fail to construe this regulation as binding, or that failing to comply therewith, is negligence on the part of the defendant in error and a failure to perform a statutory duty, in effect setting aside the regulation of the Postoffice Department as a nullity.

In the opinion of the Circuit Court of Appeals, the learned Judge (Garland) who spoke for the Court said: "To illustrate: Supposing the agent Magson had left the "mail-sack on the depot platform, and by reason thereof "the same had been stolen. This, in the absence of any "showing that defendant in error had not used proper care

"in the selection of Magson as its agent, would have been "the negligence of Magson, for which he would have been "liable, but it would not have been the negligence of de- "fendant in error." (*Circ. Ct. of App. Trans. p. 55; 117 F. 434.*)

Section 713, Postal Laws and Regulations, Ed. 1893, says: "At places where the railroad companies are required to take the mails from and deliver them into post-offices or postal stations (being the case at bar) the persons employed by the railroad companies to perform such services *are agents of the companies, and not employees of the postal service,*" etc.

The Circuit Court and Circuit Court of Appeals for the Eighth Circuit in deciding this case say: "This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey; the subordinate agent of the defendant in error * * *. The United States only can carry the mail, hence, we believe that the character of the service in which the agent is engaged must determine in the case at bar, as to whether the subordinate agents of the defendants in error, in so far as they were engaged in carrying the mail, were or were not public agents * * *. We are satisfied, however, that if the negligence of any one directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail, the defendant in error is not liable." Transcript C. C. App. p. —.

Note—Magson is the employee of the railroad company at Harvey, employed by defendant in error, to perform the duty of defendant in error in caring for the mail. Section 1023, Postal Laws and Regulations, Ed. 1893, provides: "Whenever the mail on any railroad route arrives at a late hour of the night, the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station, until the following morning, when it must be delivered at the postoffice." The complaint charges that this was not done, and no such "secure and safe room or apartment" was furnished by defendant in error. The Courts below held that the defendant in error is not required to do so.

The Statutes of the United States likewise impose a duty upon defendant in error to have cared for this mail safely.

The decision of each of the lower courts is in direct conflict with the Postal Regulations and Statutes as quoted. These questions are the basic ones upon which the issues of this case determines. The regulations quoted are in

effect and force statutes, the lower courts having committed the error of misconstruing and nullifying these statutes. This Court is called upon to correct this error. construing these statutes and regulations giving them the legal standing they merit, and validating the action of the Postmaster General in their promulgation as within the proper powers appertaining to his office.

The Postal Regulations quoted were in force at the time this loss occurred, and are still in force.

The case also involves, on the facts stated in the complaint, the question of exemption of a railway company, carrying the mail, from liability under the rule of respondeat superior. either as a public agent of the United States, or as a private corporation for profit, performing the duty in question, established by the Statutes of the United States, the Circuit Court of Appeals and the Circuit Court having each held, in effect, that the railway company was entitled to the exemption in this respect which the law gives to one who is strictly a principal public officer.

This case comes within the exception contained in section 6 of the Judiciary (Circuit Court of Appeals) Act of 1891, as follows:

"In all cases not hereinbefore, in this section, made final, "there shall be of right an appeal or writ of error or re- "view of the case by the Supreme Court of the United "States, where the matter in controversy shall exceed One "Thousand Dollars, besides costs." (*1 Supp. U. S. Stats. p. 904.*)

This case falls within the provision above quoted, as construed by several decisions of this court.

184 *U. S.* 676, (46 *Law* 754); *Howard v. U. S. to use of Stewart*, (1902); and cited cases.

187 *U. S.* 41; *Robinson & Co. v. Belt.* (1902).

185 *U. S.* 505, (46 *Law* 1012:) *McFaddin v. Evans-Snider-Buel Co.* (1902.)

184 *U. S.* 258, (46 *Law* 528); *Studebaker v. Perry* (1902.)

184 *U. S.* 173, (46 *Law* 487); *Marande v. Tex. & P. R. Co.* (1902).

164 *U. S.* 105, (41 *Law* 367); *Press Pub. Co. v. Monroe* (1896).

175 *U. S.* 262, (44 *Law* 156); *Bolles v. Outing Co.* (1899).

175 *U. S.* 148, (44 *Law* 109); *Brady v. Daly* (1899).

174 *U. S.* 125, (43 *Law* 920); *Auten v. U. S. National Bank* (1899).

172 *U. S.* 401, (43 *Law* 493); *Sonnentheil v. C. M. Brewing Co.* (1899).

158 *U. S.* 326, (39 *Law* 1003); *Union P. R. Co. v. Harris* (1895).

144 *U. S.* 465, (36 *Law* 506); *N. Pac. R. Co. v. Amato* (1892).

A Writ of Certiorari was also asked in this case by motion and petition submitted on December 15, 1902, which was denied on December 22, 1902. We respectfully call attention to a recent decision where, on final disposition of the case, a Writ of Certiorari was allowed, in the event such procedsure should hereafter be deemed necessary and proper in the further progress of this case.

187 *U. S.* 237; *Security Trust Co. v. Dent.* (1902.)

DIVISION. V.

THE DUTY OF A RAILROAD COMPANY TO CARRY THE MAIL SAFELY.

The care and carriage of the mail has always has been divided into two principal branches governed by different statutory provisions, one of which has been entrusted to the exclusive care and custody of those subsequently adjudged to be principal public officers and their subordinates in the public service, while the other has been placed in charge of persons, natural, corporate or artificial, who were not public officers, and of the ordinary private employees of such persons.

POSTAL SYSTEM UNDER THE CONSTITUTION: Concerning the postal system the Constitution provided: "The Congress shall have power * to establish postoffices and Post Roads." (*Art. 1, Sec. 8, Par. 7.*)

This court stated in an opinion by Mr. Chief Justice Fuller that: "In *Ex Parte Jackson, 96 U. S. 727, 24 Law* "*877, (1878,)* it was held that the power vested in Congress "to establish postoffices and post roads embraced the reg- "ulation of the entire postal system of the country, and "that under it Congress may designate what may be car- "ried in the mail and what excluded; that in excluding "various articles from the mails the object of Congress is "not to interfere with the freedom of the press or with "any other rights of the people, but to refuse the facilities "for the distribution of matter deemed injurious by Con- "gress to the public morals. When the power to establish "postoffices and postroads was surrendered to the Con- "gress, *it was as a complete power*, and the grant carried "with it the right to exercise all the powers which made "that power effective." (*P. 134; Law p. 102.*)

143 U. S. 132, (36 Law 102); Ex Parte Rapier, (1891).

The effect to be given to powers conferred by the Constitution on Congress was also considered by this court in:

4 Wheat 400, (4 Law 600); McCulloch v. State of Maryland (1819).

16 Pet. 608 (10 Law 1086); Prigg v. Commonwealth of Pennsylvania (1842).

144 *U. S.* 263 (36 *Law* 429); *Logan v. U. S.* (1892).

The court of Claims has maintained the power of Con-

gress to compel the carriage of mail by sea, in steamships having United States registry. That court said:

"During the period now under consideration, United "States steamships *were by law forced to take the United States "mail* whether they wished to do so or not, (*Sec.* 3976 *and "Sec.* 4203 *R. S., repealed June* 26, 1884; *Ch*, 121, *Vol.* 23, "*Stat. L.*), and moreover to take them at such rate as the "Postmaster General chose to allow (subject to a maximum "limitation only). He had despotic power—we do not "doubt he used it fairly and wisely." (Pg 19.)

28 *Ct. Claims* 15; *Pacific M. S. S. Co. v. U. S.* (1892).

The Wisconsin Supreme Court in *Muster v. Chicago, M. & St. P. R. Co.*, said: "The government compels the com- "pany to carry the mails and designates the trains upon "same shall be carried."

61 *Wis.* 325. (21 *N. W. R.* 252); *Muster v. Chicago, M. & St. P. Ry. Co.* (1884).

We will now briefly refer to the statutes of the United States and the decisions concerning the carriage of the mail which divide the postal system into the two principal branches above referred to, the Revised Statutes being re-enactments of prior laws.

The Revised Statutes of the United States, (1878 Ed.,) Sec. 3850 provides that: "No postmaster, assistant post- "master, or clerk employed in any postoffice shall be a con- "tractor or concerned in any contract for carrying the "mail."

The duties of a postmaster and of his subordinates are to receive, safely care for, distribute and deliver to the person entitled thereto, or to the proper carrier, mail matter deposited or received in his office, and such duties are fixed by statutes relating to those particular officers with which we are not concerned in this case.

A postmaster is not a carrier of the mail.

8 *Watts (Pa.)*453; *Schroyer v. Lynch.* (1839.)

A mail contractor or railway company transporting the mail does not handle the individual pieces of mail, but receives such mail matter enclosed in locked mail pouches or mail sacks.

The carriage of mail by land was for many years provided for exclusively by express written contracts entered into between the contractor and the government.

It is said that railways were first used by the United States for postal purposes in 1334.

10 *World's History and its Makers, p.* 45.

The general introduction of railroads into England and the United States from about 1845 to 1850, and their subsequent enormous development, with the tremendous increase of the volume of mail matter to be carried, due to greater dispatch, cheaper rates of postage and the rapid growth of all business interests, have made necessary certain changes, from time to time, in this method of providing for carriage of the mails.

The Act of Victoria (1 and 2 Vict., Ch. 98,) containing the provision for the carriage by railway of the mail and the person in charge thereof, was adopted in 1847. The same provision, in almost identical terms, was enacted by the United States in 1872, and now appears as U. S. Rev. St. Sec. 4000. Subsequent reference is made to this matter in this division of the Brief.

All railroads are established as "postal routes." (R. S. Sec. 3964.) No advertising for bids was required to authorize the Postmaster General to enter into express written contracts with railway companies for carrying the mail. (*R. S. Sec.* 3942; *Act of May* 17, 1878, *Chap.* 107; 20 *St. L.* 61, 1 *Supp. p.* 164.)

But the carriage of mail by railroad was still required to be done under express written contracts, made in accordance with the provisions of the Revised Statutes.

This edition of the Revised Statutes (1878), included all Acts of Congress enacted by the 44th Congress, ending March A. D. 1877, and was certified to by the Hon. Wm. M. Evarts, Secretary of State, on February 18th, 1878.

In 1879 an Act of Congress was passed which contained the following provisions:

SEC. 3: The Postmaster General shall in all cases decide upon which train and *in what manner* the mails shall be conveyed.

SEC. 33: * and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.

(*Act of March* 3, 1879, *ch.* 180; 20 *St. L. 355;* 1 *Supp. pgs.* 245, 250.)

The Postoffice department construed the Revised Statutes then in force, together with the Act of March 3, 1879, above set forth, as empowering the department to require railroads to carry mail upon notification from the Department, for a compensation for the use of postal cars belonging to the railway company and for the carriage of the mail and the person in charge thereof fixed by the Department at the maximum allowed by Acts of Congress,

cited in the third division of this brief. This service is called by the Department "recognized service."

A case involving the subject of *recognized service* was before this court in 1896.

164 *U. S.* 94, (41 *Law* 363); *Central P. R. Co. v. U. S.* 1896).

Another case involving the same class of service was decided by the Alabama Supreme Court in 1884.

76 *Ala.* 357; *Central R. & B. Co. v. Lampley.* (1884.)

There was also one before the Court of Claims concerning the compensation of the Railway Company carrying the mail.

24 *Ct. of Cl.* 355; *Minneapolis & St. L. R. Co. v. U. S.* (1889.)

These are the only cases of "recognized service" discovered by counsel, which have been before the courts prior to this case.

No express contracts have been entered into between the government and any railway company since a short time after the passage of the Act of March 3d, 1879.

In this case the complaint alleges that the mail was being carried by the defendant in error upon notification from the Postoffice Department for a compensation fixed by the department in accordance with law for use of its postal cars and for the carriage of the mail and the person in charge thereof. (Trans. p. 34).

The complaint further alleges: "That during all of the "period hereinbefore referred to, there was no contract of "any kind between defendant and the United States Gov- "ernment, concerning or providing for the carriage, by de- "fendant, of said mails, or any part thereof, or of the per- "son in charge of said mails, upon or along defendant's said "line of railway or any part thereof." (Trans. p. 32).

Where the distance between a railway station and the postoffice is not more than 80 rods, the agent or representative of the railway company is required to take mails from and deliver them into the postoffice.

At places where the railroad companies are required to take the mails from and deliver them into postoffices or postal stations the persons employed by the railroad companies to perform such service are agents of the companies and not employees of the postal service." (Postal Regulations No. 713; Supra, Div. 3; Trans. p. 34.)

At all other places the mail is transported between the

postoffice and railway station by transfer contractors or transfer clerks.

DEPARTMENT REGULATIONS: The provisions of the Revised Statutes concerning departmental regulations, powers and duties of the Postoffice Department are contained in R. S Secs. 158, 161 ad 396, (pars. 2 and 9). Also the Act of February 27, 1897, enacting a new Sec. 3926 concerning registered mail, which has been previously set out in this brief.

This court takes judicial notice of such rules and regulations.

152 *U. S.* 221, (38 *Law* 419); *Caba v. U. S.* (1894).

If it is claimed that such regulations are not consistent with law, the same rule of decision is applied as when an Act of Congress is assailed as unconstitutional.

177 *U. S.* 465, (44 *Law* 849); *Boske v. Comingore.* (1900.)

Such regulations, at any rate when they have been recognized by Congress, have the force of law.

116 *U. S.* 181, (29 *Law 605*); *Smith v. Whitney.* (1886.)

4 *How U. S.* 117, (11 *Law* 901); *Gratiot v. U. S.* (1846.)

100 *U. S.* (10 *Otto*) 13, (25 *Law* 539); *Ex Parte Reed.* (1879.)

The regulation in question is recognized by the Act of March 3d, 1887. previously quoted, which made provision for the transfer of mails where the Regulations of the Postoffice department did not require railroad companies to deliver into and take from the postoffice the mails carried on their lines.

This regulation was then in force. A regulation containing this identical requirement has been in force ever since the mails have been carried by railways. This subject was discussed by the Court of Claims, and this regulation as Section 349 of the Postal Regulations of 1873 and as Section 639 of the Regulations of 1879 are set out in the opinion of that Court.

24 *Ct. Cl.* 355; *Minneapolis & St. L. R. Co. v. U. S.* (1889.)

Defendant in error has acquiesced therein within the rule established in,

164 *U. S.* 93, (41 *Law* 362); *Cent. P. R. Co. v. U. S.* (1896.)

Having undertaken the duty of carrying for this mail sack under terms imposed by Sec. 713 and 1023 of Postal Laws and Regulations' 1893, they can hardly avoid the liability following, and assumed thereunder.

Another early case reads: "As to an action on the case "lying against the party really offending. there can be no "doubt of it, for whoever does an act by which another re- "ceives an injury, is liable in an action for the injury sus- "tained. * So is the Postmaster (General) for any default "of his own." (p. 765.)

2 *Cowper's R.* 754; *Whitfield v. Lord le de Spencer.* (1778.)

All cases referred to in this brief, whether decided by the State, Federal or English Courts, without exception, hold that the duty of the person in charge of mail is one owing to the owner of the mail, so that for loss thereof or injury thereto the owner may maintain action against the person offending.

The fact that there are a large number of letters, the property of one addressee, which it may be necessary, for convenience in handling or storing, to gather together and tie up in bunches or bundles, does not change or affect the nature of this duty.

In *American School v. McAnnulty*, 187 U. S. 94, petitioner alleged that that it was receiving 3,000 letters a day, amounting to 25,000 letters when its bill was filed, the same containing at least $10,000 in money. The duty of the Postmaster General and of the local Postmaster to the owner of the mail was not changed, in any manner or degree, because of the large number of letters.

187 *U. S.* 94; *American School of Mag. H. v. McAnnulty.* (1902.)

All mail matter deposited in a Postoffice is placed there for the purpose of transmission or transportation from the sender to the addressee. The fact that. for convenience of transportation, mail matter owned by different persons is gathered together, tied up in bundles and enclosed in mail sacks, does not affect or change the nature of this duty. The public at large has no interest in or concern with the several pieces of mail belonging to the individual owners thereof. The owners of mail in bundles or sacks have no interest whatever in any mail therein contained except their own.

It resembles the duty owing to an individual lawfully upon a street while construction or repairs are being made upon an overhead bridge or viaduct. The duty to exercise care is due to each individual passing under the bridge. The public generally, who are not under the bridge, and individuals, when not under the bridge are not affected by the operation being carried on.

Under such circumstances one injured through the negligence of those in charge of such work could recover therefor. Nor would the duty or liability be changed because a number of individuals were enclosed in a street car passing under the viaduct or bridge and through negligence a girder or other heavy body fell striking the street car and injuring one or more passengers therein.

The cited cases settle the law as to the liability or exemption from liability of a public officer in charge of the mail, for the default, negligence or misfeasance of his private employee, and for his own personal default, as well as the limitations upon the powers of the public officers of the United States engaged in the Postal Service.

The Source of the Obligation to carry mail safely: The statutes of the United States authorize the Postmaster General to provide for carrying mail on all post roads established by law (R. S. Sec. 3965), and in all cases to decide upon what trains and in what manner the mails shall be carried. (Act. of March 3, 1879, cited supra.)

R. S. Sec. 4000 provides: "Every railway company "carrying the mail shall carry on any train which may run "over its road, and without extra charge therefor, all mail-"able matter directed to be carried thereon, with the per-"son in charge of the same."

Sec. 1023, Postal Laws and Regulations, Ed. 1893, pro-"vides, the railroad company must retain custody thereof "(the mail) by placing the same in a secure and safe room "or apartment of the depot or station until the following "morning, when it must be delivered at the postoffice."

No right to sue the United States is anywhere conferred, for damages caused by the loss of mail matter, registered or unregistered; nor is a carrier of the mail relieved by any statute from any liability arising from the loss of mail matter caused by the default, negligence or misfeasance of its employee.

The statutes of the United States cotemplate that valuable articles may be sent by registered mail, and Congress has not placed any limitation upon the value of the articles which may be transmitted, nnr, at any time in question in this case, had any limitation on such amount been fixed by postal regulations established by the Postmaster General.

It will be observed that R. S. Sec. 4000 povides: (1) for the carriage of the mail, and (2) for the carriage of the person in charge of the mail. The obligation to carry the property and person is imposed by the same statute in identical terms.

Plaintiff in error contends that whether there is an express contract, or an implied contract or no contract for the carriage of the mail, the obligation to carry safely is one imposed by law. The repetition in an express contract of an obligation imposed by statute neither adds to nor in any manner effects the duty imposed by law. Nor would the omission from the contract of an obligation imposed by the statute diminish or in any manner effect the duty thus imposed by law.

And if there was an implied contract, the terms of which were composed of "the statutes of the United States and the regulations "of the department" (as was held by the Court of Claims in a case of this character, 24 Ct of Cl. 360; *Minneapolis & St. L. R'y Co. v. U. S.*, 1889), the Statutes of the United would not cease to have the force and effect of law, because, for certain purposes, those statutes are treated as parts of an implied contract, but the duties or obligations imposed upon the railway company by said statutes continue to be duties and obligations imposed by law.

Defendant in error contends that the relation between the government and the railroad company. for the carriage of the mail, is contractual and that the owner of mail, not being a party to or in privity with any party to said contract, cannot maintain an action for a loss caused by a breach of such contract.

The learned Circuit judge on this point held with defendant in error. The Circuit Court of Appeals stated that it was unnecessary to determine this contention. in the view it took of the case.

Plaintiff in error contends that this action does not turn upon the question of a contract or no contract existing between the defendant in error and the United States; such contract is a collateral and unimportant feature. The Statutes and Regulations of the Postoffice Department are set out as defining the duties of the defendant in error. The duty of the owner of the registered package lost is independent of any contract or question of relations growing out of a contract between defendant in error and the Government, and this action lies for damages to the owner of the registered package, because of the failure of the defendant in error in its duty, independent of any such contract.

In 1851, an English statute, identical with R. S. Sec. 4000, was construed by the Court of Queen's Bench, in the case of *Collett v. London & N. W. R'y. Co.* (20 L. J. 411) A

synopsis of the English Act, 1 and 2 Vict. Ch, 98, Secs. 1, 6 and 7, is made by defendant's counsel. (Law Journ. p. 413 – left column).

The action was for damages to a railway mail clerk, caused by the negligence of defendant's employee.

There was a contract between the government and the railway company for the carriage of the mail and the person in charge thereof. The complaint alleged that "it "became and was the duty of said company to use due and "proper care and skill in and about the carrying and con-"veying the plaintiff;" plaintiff then alleged certain negligence and special damages. (p. 412.)

A demurrer to the complaint raised the question "that "the declaration did not disclose sufficient to show that "any duty as respects carriage existed between the plain-"tiff and the company, or that if any such duty existed, "that there has been a violation of it." (p. 412.)

Opinions were handed down in this case by Campbell, C. J., and by Patterson, Wightman and Earle, J. J., all affirming defendant's liability, as follows:

Campbell, C. J., "There is, I think, no doubt at "all in this case. The allegations in the declaration that "it was the duty of the defendants to use due and proper "care and skill in and about carrying and conveying of the "plaintiff, is made out in point of law. **That duty does not "arise from any contract with the plaintiff but from the obligation "imposed by the legislature upon the company to carry the mail bags and "the officers of the postoffice in charge of the letters, and if it be the "the duty of the company to carry the plaintiff at all, it must be their "duty in doing so to use reasonable care and skill. It cannot be said "that it is enough for the company to bring the dead body to the end "of the journey. It is their duty to take care that reasonable care and skill is used, and here a breach of that duty is alleged, and the "plaintiff is entitled to maintain an action for the injury he has "thereby sustained."** (pp. 413, 414.)

Patterson, J.: "This is not a matter of contract, but a "duty cast upon the company by an Act of Parliment. * "There is no contract in the case at all but an obligation is "cast upon the company to carry, and the duty arising out "of that is to carry safely and securely a breach of which is "alleged here. (p. 414.)

Wightman, J.: "I am of the same opinion. The duty "alleged arises not from any contract, but from the obli-"gation cast upon the company by the Act of Parliament." (p. 414.)

Earle, J.: "The defendants have cast upon them the

"public duty of carrying persons in the situation of public "servants, and they have been guilty of a breach of that "duty, which has resulted in special damage to the plain- "tiff. This, therefore, is the common form of an action on "the case for the non-performance of a public duty." (p. 414.) Judgment for plaintiff.

20 *Law Journal* 411, (16 *Q. B.* 984); *Collett v. London & N. W. Ry. Co.* (1851.)

It will be noticed that the English Act considered in the *Collett* case was enacted prior to 1851. This provision was subsequently enacted by the Congress of the United States on June 8, 1872.

Act of June 8, 1872; Ch. 335, Sec. 213, V. 17, p. 309.

Rev. St. of U. S., (1878); Marginal Notes to Secs. 4000 and 3964.

Rev. St. of U. S., (1878); Reference Index, p. 1156, left column, Sec. 213.

2 U. S. Compiled Stat., (1901); p. 2719, Sec. 4000.

The effect of the adoption of a foreign statute; in relation to the decisions of foreign courts in the construction of such statute, was considered by this Court, in the case of *Robinson v. Belt*, 187 U. S. 41, where this Court said:

In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus in *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed 327, it *was said* by Mr. Justice Story (p. 18, Law p. 333): "It is doubtless "true, as has been suggested at the bar, that where Eng- "lish statutes, such, for instance, as the statute of frauds "and the statute of limitations, have been adopted into our "own legislation, the known and settled construction of "those statutes by courts of law has been considered as "silently incorporated into the acts, or has been received "with all the weight of authority." In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, Law p. 334): "The words "of our statute are not identical with those of the statute "of James, but it can scarcely admit of doubt that they "must have been within the contemplation of those by "whom it was framed, as well as the construction which "had been put upon them by Lord Coke."

In 1867, the Virginia Supreme Court decided an action to recover for money lost out of the mail through the negligence of an employee of a mail contractor. There was a

contract between the government and the mail contractor. The opinion said: "And it is equally clear that the fact "that Sawyer's obligation to carry the mail arose under "a contract with the government, and that he made no con- "tract with Corse, is no answer to the present action, "which is not founned on contract, *but on the breach of "duty.*" (pp. 238, 239.)

The Virginia court cited the *Collett* case as authority that the liability arose from a failure to perform a duty imposed by law. (p. 242.)

17 *Gratt.* (*Va.*) 230; *Sawyer v. Corse.* (1867.)

In 1884, the Albama Supreme Court decided an action brought to recover the value of money lost through the negligence of an employee of a railway company carrying the mail upon notification and without contract. The court said: "We approve and adopt the legal propositions "as to the liability of a contractor, maintained and asserted "in Sawyer v. Corse, 17 Gratt. 230. (p. 366.)

76 *Ala.* 357: *Central R. R. & B. Co. v. Lampley.* (1884.)

In 1857 a case of personal injury to a railway mail clerk caused by the negligence of an employee was before the New York Court of Appeals. There was a contract between the government and the railway company, and it was suggested that the compensation was paid by the goverment for the carriage of the mail, but that the mail clerk was carried without compensation.

The court said: "It necessarily follows that it (de- "fendant's liability) must rest exclusively upon that obli- "gation which the law always imposes upon everyone who "attempts to do anything, even gratuitously, for another, "to exercise some degree of care and skill in the perform "ance of what he has undertaken. (p. 447.)

"The duty arises in such cases, I apprehend, entirely "independent of any contract, either expressed or implied. (p. 448.)

"But where there is anything in the circumstances to "to create a duty, either to an individual or the public, "any neglect to perform that duty, from which injury "arises is actionable. (p. 449.) There can be no material "difference between a gratuitous undertaking to transport "property, and a similar undertaking to transport a per- "son. If either are injured through the culpable careless- "ness of the carrier, he is liable." (p. 449.)

15 *N. Y.* 444; *Nolton v. Western R. Corp.* (1857.)

In 1884, another case of personal injury to a railway

mail clerk, caused by the negligence of an employee of a railway company, was before the New York Court of Appeals, which said: "*The absolute duty* of providing a car "for the transportation of the mail, and of carrying the "such mail and the persons in charge thereof, *is imposed by "the statute, and an imperative obligation for its performance. "rests upon the corporation* accepting the public mails for "the purpose of transportation." (p. 574.)

95 *N. Y.* 563; *Seybolt v. N. Y., Lake Erie & W. R. R. Co.* (1884.)

The Supreme Court of Missouri, in actions for personal injury to a railway mail clerk caused by the negligence of an employee of a railway company, held that a railway company owes to a railway mail clerk the duty to carry him safely, and that so far as concerned safe transportation, he was a passenger.

102 *Mo.* 540; *Magoffin v. Mo. Pac. Ry. Co.* (1890.)

105 *Mo.* 455; *Mellor v. Mo. Pac. Ry. Co.* (1891.)

In a Massachusetts case, Slavens & Co. were transfer mail-contractors. Their employees, together with a U. S. railway transfer clerk, unloaded mail from trains operated by the Old Colony Railroad, placed the mail on a sidewalk adjoining the depot, then loaded it on wagons and delivered at the postoffice. This sidewalk furnished ingress and egress to passengers to and from the railway depot.

Amory was injured by falling over a mail sack thus left on the sidewalk. Amory recovered damages for this personal injury from the railroad company; and after paying the judgment, the railroad company recovered the amount so paid from the transfer contractors, Slavens & Co.

Whatever the employees of the railroad company and the transfer contractor did or failed to do, was done or omitted by them in carrying and caring for the mail, on behalf of their respective employers.

148 *Mass.* 363; *Old Colony Rd. v. Slavens.* (1889.)

Two cases of personal injury to railway mail clerks have been before this court, but in the manner in which the cases were brought before this court, no construction was given to R. S., Sec. 4000.

Gleeson v. Virginia Midland Ry. Co., (140 U. S. 435; 35 Law 459,) was brought for a personal injury to a railway mail clerk. The Railway Company's line ran through the District of Columbia and the State of Virginia; on what

part of the line the accident occurred is not stated. On the trial the railway mail clerk was given the status of a passenger. The verdict was for the defendant which was affirmed by the Supreme Court of the District of Columbia.

The case was brought to this court in error and reversed because the trial court had refused to instruct to the effect "that the happening of an injurious accident is, in "passenger cases, prima facie evidence of negligence on "the part of the carrier." Plaintiff in error could not complain of the ruling of the lower court giving him the rights of a passenger, as this ruling was in his favor, and could not be objected to by him.

140 *U. S.* 444-445, (35 *Law* 463); *Gleeson v. Virginia Midland Ry. Co.* (1890.)

DIVISION VI.

LIABILITY FOR FAILURE TO PERFORM A STATUTORY DUTY.

The authorities cited in the preceding division of this brief are also authorities upon the proposition that one failing to perform a duty imposed by law, is liable for damages caused to a third person, arising from such failure.

In a personal injury case decided in 1852, this court said: "The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily "founded on any contract or privity between the parties, "nor affected by any relation, social or otherwise, which "they bore to each other." * "This duty does not result "alone from the consideration paid for the service. It is "imposed by the law, even where the service is gratuitous." (p. 485; 14 L. 509.)

55 *U. S.* (14 *How.* 485, (14 *Law* 509); *Philadelphia R'y. Co. v. Derby.* (1852).

The same principle is maintained in:

57 *U. S.* (16 *How.*) 469, (14 *L.* 1019); *Steamboat New World v. King.* (1853).

84 *U. S.* (17 *Wall*) 357, (21 *Law* 627); *New York R'd Co. v. Lockwood.* (1873).

95 *U. S.* (5 *Otto*) 655, (24 *L.* 535); *Grand Tr. R'y. Co. v. Stevens.* (1878).

We have already called attention to the holding of the New York Court of Appeals in the '*Seybolt*' case, and of other courts citing its opinion with approval, to the effect that the carrying of the mail is an absolute ministerial duty.

We do not deem it necessary to pursue this subject further, as it seems to us clear the duty of a railway company to carry and care for the mail is an absolute ministerial duty.

DIVISION VII.

NEGLIGENCE OF THE RAILWAY COMPANY ITSELF.

Facts Alleged: The negligence of the railway company itself charged in the complaint, is as follows:

1. It failed to furnish any suitable or safe room, place or receptacle in which the mail could be safely or securely kept, under lock or key or other secure fastening, but kept the same in a room not designed for or capable of safely keeping valuable articles or property.

2. It made no provision for the safe keeping of said mail-pouch, in case of the absence from its depot of its night station agent, either in the company's business or on his own affairs, or in case its said night station agent was asleep in the depot.

3. It placed the mail-pouch in charge of its night station agent, who was required to attend to his ordinary duiies as a railroad employee, besides taking care of the mail, and failed to place and keep in charge of said mail a competent and vigilant employee.

4. It failed to safely care for and guard said mail-sack and its contents during the night, and to safely deliver the same to the postmistress at the postoffice at said town of Harvey, North Dakota.

Even if the railway company is held to be a public agent and entitled to exemption from liability for the misconduct of its employees the same as a public officer enjoys, it is certain the railroad company is liable for its own negligence.

Postal Regulation, Secs. 713 and 1023, contains three distinct requirements to be performed by the railway company at the intermediate stations therein referred to:

1. To receive the mail from the train for the purpose of making a delivery thereof.

2. To provide a safe apartment or room therefor and keep the mail safely while in its custody.

3. To make such delivery of the mail into the postoffice.

This requires proper care by the railway company of the contents of the mail-pouch, so that *the pouch and its*

contents, as received by the railway company, shall be delivered safely "into the postoffice."

The law makes this the duty of the defendant in error, and not of its mere private employee.

Concerning delivery of the mail, it was said in an early case:

"Now *delivery, ex vi termini*, implies a delivery to a "person, not a mere bringing to a place. unless by some "qualification of the phrase, nor does a mere abandonment "or quitting possession of the letter, amount to the idea of delivery." (p. 907.)

3 *Wils.* 443, (2 *Blackstone R.* 906); *Rowning v. Goodchild.* (1773).

5 *Am. & En. Enc. of Law*, (2nd Ed.) 268; *Title*, "*Carrier of Goods.*" (x-1—c—4).

When a carrier is *required by law or special contract* to deliver goods at a particular place its liability as a carrier continues until the goods have been delivered at that place.

69 *Ill.* 285; *Chicago R. Co. v. Sawyer.* (1893.)

49 *Ill.* 33; *Vincent v. Chicago Ry. Co.* (1868.)

3 *Mich.* 23; *Moore v. Chicago Ry. Co.* (1852.)

It is certainly the spirit of the law that mail shall receive affirmative diligence in its care, custody and delivery.

It is a well settled rule that a railway company, as a carrier, is bound to furnish sufficient means and facilities for the reasonably safe keeping and prompt transportation of property to be carried and cared for by it.

The railroad company must be held to have known the condition of its own depot, what preparation it had made for the safe care of a mail sack in its possession in the way of appliances for its safe keeping, and the person placed to take charge thereof, and the double character of the duties imposed upon its employee in his general work for the company and in the care of the mail sack.

Mr. Thompson says: "It is a general principle in the "law of negligence that where there is a *duty of finding out "and knowing*, that is a duty of *inspection or inquiry, negli-"gent ignorance* in the intendment of the law, is equivalent to *actual knowledge.*"

1 *Thompson's Commentaries on the Law of Negligence*, (1901); *p.* 9, *Sec. 8.*

The complaint alleges that the mail sack was placed on the floor or hung on the wall of a room in the depot, which said room was not designed for or capable of safely

keeping valuable articles or property. That no room box or safe receptacle was provided so that the mail sack could be locked up by lock and key or other secure fastening, and safely kept from the time it was received about 11 o'clock P. M. until delivered "into the postoffice" on the following morning.

Also, that an ordinary unsworn employee of defendant, its night operator Magson, was placed in charge of the mail-sack, but Magson had his usual duties to perform for the company besides looking after the mail-pouch. When, for any reason Magson was out of that room in the depot, whether on the company's business or on his own affairs, or in case Magson was asleep, the mail-pouch was without any protection whatever.

These contingences were so highly probable that reasonable care and prudence and postal regulations required the railroad company to furnish a strong box, cupboard or room where the mail sack could be kept under lock and key, which could be done at small expense, so that any third person gaining access to this room in the depot, lawfully or unlawfully, would not have found the mail sack lying around or hanging up without any protection whatever.

It is suggested by the Circuit Court of Appeals that Magson himself, under the allegations of the complaint, quoted in their opinion, might have stolen the package and money therein contained. This suggestion is due to the fact that parts of the complaint bearing upon the question have been overlooked.

Besides the clause quoted in the opinion the complaint alleges, in substance, that one Soule had no right of access to the room where said mail sack was kept or to the said mail sack; that said Soule had forged a key to said mail sack, and personally or with the aid and assistance of some person or persons to this plaintiff unknown did enter the room where said mail sack was kept.

The complaint further alleges: "That by reason of "defendant's said negligence, some person to this plaintiff "unknown, in some manner not known to this plaintiff, ob-"tained access to said mail sack and opened the same and "abstracted or took therefrom said registered package "whereby the same was wholly lost to said German State "Bank. That said Soule had previously unlawfully obtain-"ed and caused to be made, a key to the United States "Government mail sacks or mail pouches, and personally, "or with the aid and assistance of some person or persons,

"to this plaintiff unknown, did enter one of the rooms con-
"tained in the said depot building, where said mail sack or
"mail pouch had been placed by defendant's operator or
"night agent, on the floor or wall of said room, and not in
"any separate room, closet or other safe receptacle. cap-
"able of being securely fastened against any intruder or
"unauthorized person, by lock and key or otherwise. That
"said room was not designed for or capable of safely keep-
"ing valuable articles or property." (Trans. p. 35.)

Also: "That *said Soule, or other person*, had no right or
"access to said room, or to said mail-sack or mail-pouch
"but *through the negligence of defendant and its said night*
"*operator or night agent as set forth in this complaint, did*
"*gain entrance to said room and obtain access to said mail-*
"*sack or mail-pouch, and the mail matter therein contained*,
"and did find said mail-sack or mail-pouch situated or
"placed as above set forth, so that the same was readily
"accessible to any person gaining entrance to said room,
"*and did find said mail-sack or mail-pouch wholly unprotected*
"*and unguarded by said night operator or otherwise.*" (Trans.
35 and 36.)

Also: "That *said Soule, or other person, by reason of the*
"*aforesaid negligence of said defendant and its said night sta-*
"*tion agent or night operator, did obtain access to said mail-*
"*sack or mail-pouch and did unlock the same and abstract and*
"*take therefrom the aforesaid registered package*, containing
"said three thousand dollars ($3,000.00) in currency and did
"unlawfully convert the same to his use and benefit and the
"same has never been delivered or returned to said German
"State Bank or to said Metropolitan Bank of Minneapolis,
"or to this plaintiff, the Bankers Mutual Casualty company,
"or to any one for the benefit of any of them." (Trans.
p. 36).

The complaint distinctly alleges that the taking of said registered letter and currency was done by Soule or some other person through the negligence of Magson and the railway company. That Magson and the railway company were only concerned in the abstraction of said package of currency, through their negligence, thus affording the opportunity for Soule or some other person to gain access to said mail-sack, to open it and to steal the package therefrom.

Common Carriers: We have not the slightest doubt of the constitutional power of Congress to impose upon a person, natural or artificial, undertaking to carry the mail and while so engaged, the same liability as a common car-

rier has, and this is especially true when the person untaking the carriage of the mail, is an artificial being, a creature of the law, already engaged in the business of a common carrier of property and passengers, it would be simply adding another species of property to be transported upon the same terms as all other property is carried by it.

No citizen of the United States or corporation organized under the law of any state can evade or escape from the constitution and laws of the United States, as well as the constitution and laws of the particular state where it resides, or, if a corporation, under which it was organized. Every railway company must accept its articles of incorporation subject to the Constitution of the United States.

Conceding that the constitutional rights of the person, natural or artificial, must be respected, and that an adequate compensation must be paid for the carriage of the mail, the United States, in time of peace can require and compel the carriage of the mail, troops, artillery, horses, munitions of war and whatever else may be required to be carried under the various powers conferred upon Congress.

A natural person in time of peace, may be required to be enrolled in the militia and to perform such active services as are necessary to render the militia efficient. Such person may also be required to serve as a juror of the United States.

We believe that the United States has power to compel the service of its citizens, in the army and navy of the United States, in time of peace, so that other constitutional rights of the citizens are duly preserved. We feel certain that this power exists in time of war.

The exercise of these powers is a questions of legislative discretion, rather than one of the existence of the power itself.

In the case at bar the railroad company has undertaken to carry the mail on the terms fixed by Congress aud the Postoffice Department. It is not in a position now to question the adequacy of the compensation allowed for the service or dispute the validity of the Postal Laws and Regulations under which it earned the compensation in view when it performed the service. If unwilling to undertake the duty under the terms thereby imposed or if not satisfied with the compensation provided for the service, it ought to have made its objection thereto at the threshold, and before undertaking the carriage of the mail on the terms established

It is true the relation of a common carries is contractual, the terms being mainly implied by law, as the actual transaction usually consists of the payment of fare and the issuance of a passenger ticket or the payment of freight and the delivery of a receipt therefor, all other terms of the contract being implied by law.

But the same degree of care, as is required of a common carrier, and the same liability for failure to exercise the required degree of care, may be established by law, as to the carriage of the mail. There is no express statute fixing the degree of care, and the real question is as to the degree of care required by the Statutes of the United States, in force at the time in question, which are set forth in this brief.

Compensation: The compensation paid to the carrier of the mail and the person in charge thereof is paid by the United States government. Nothing is paid to the carrier by the owner or sender of the mail. or to the person in charge of the mail. This is true in all the railway mail clerk cases previously cited, in which recovery was had against the railway company.

This subject is considered in the following cases.

79 *Tex.* 371; *Gulf Ry. Co. v. Wilson.* (1893.)

133 *Ind.* 346; *Cleveland Ry. Co. v. Ketchum.* (1891.)

6 S. *Car. Rich.* 130; *Hammond v. North E. Ry.* (1874.)

66 *N. Y.* 313; *Blair v. Erie Ry. Co.* (1876.)

15 *N. Y.* 444; *Nolton v. Western Rd. Corp.* (1857.)

Concerning liability for gratuitous service undertaken, this court said, in the Derby case: "This duty to a passenger does not result alone from the consideration paid "for the service. It is imposed by the law, even where "the service is gratuitous. The confidence induced by "undertaking any service for another is a sufficient legal "consideration to create a duty in the performance of it." (p. 485; Law p. 505.)

55 *U. S.* (14 *How.*) 485., (14 *Law* 502); *Philadelphia R. R. Co. v. Derby.* (1852.)

Conclusions: A railway company carrying the mail is under one of three obligations, (1.) the same as that of a common carrier, or (2.) the same as that of a bailee for hire, or (3) the same as that of one under a statutory obligation to carry safely. In any event, such a railroad company is required to exercise at least ordinary care, and a failure to exercise such care on the part of the railway company is alleged in the complaint.

DIVISION VIII.

NEGLIGENCE OF THE EMPLOYEE OF THE RAILWAY COMPANY.

The negligence charged in the complaint against Magson, the night station agent employed by the defendant in error at Harvey, North Dakota, is, in substance, as follows:

1. Said Magson carelessly and negligently permitted one Soule or some other person to enter the depot while said employee was or ought to have been on duty, as defendant's representative in charge of the mail-sack, and to gain access to and open said mail-sack and take therefrom the registered package in question containing said sum of $3000.00.

2. Said Magson negligently failed to care for said mail-sack and its contents, including the registered package containing said $3000.00, and negligently failed to deliver said mail-sack with its contents, as received by said Magson, to the Postmaster at Harvey, North Dakota.

Much of what has been said in the previous division of this brief on the subject of the negligence of the railway company itself, also applies to its employee Magson.

Our contention is that Magson owed the duty of the affirmative diligence in the care and custody of said mail-sack and its contents while it was in his custody and that he had no right to leave the same at any time, wholly unguarded in the room in the depot where it was kept, as the room was not adapted to the safe keeping of valuable articles or property and had no protection except his vigilance, against persons gaining access to the room, lawfully or unlawfully.

The nature and extent of the rule of respondent superior, is thus stated by this Court, in the "Derby" case, in the opinion written by Mr. Justice Grier:

"The liability of the defendants below (the railroad "company), for the neglect and injurious act of their ser- "vant, is not necessarily founded on any contract or privity "between the parties, nor affected by any relation, social "or otherwise, which they have to each other. It is true, "a traveler by stage coach or other public conveyance, "who is injured by the negligence of the driver, has an ac- "tion against the owner, founded on his contract to carry

"him safely. But the maxim of 'respondeat superior', "which by legal imputation makes the master liable for the "acts of his servant, is wholly irrespective of any contract, "express or implied, or any other relation between the in- "jured party and the master." (pp. 484-485; Law p. 509.)

Also: "The rule of 'respondeat superior', or that the "master shall be civilly liable f the tortious actions of "the servant, is of the universal application. whether the "act be one of omission or commission, whether negligent, "fradulent or deceitful. If it be done in the course of his "employment, the master is liable. and it makes no differ- "ence that the master did not authorize, or even know of "the servant act or negligence, or even if he disapproved "or forbade it he is equally liable, if the act be done in the "in the course of his employment." (p. 486; Law p. 509.)

55 *U. S.* (14 *How.*) 484, (14 *Law* 502); *Philadelphia R. Co. v. Derby.* (1852.).

The rule is thus stated by *Mr. Wood:*

"Sec. 288: When a person puts another in his place to do "certain acts in his absence. he necessarily leaves him to "determine for himself according to his judgment and dis- "cretion, according to circumstances and exigencies that "may arise, when and how the act is to be done, and trusts "him for its proper execution; consequently he (the master) "is answerable for the wrongful execution of the acts either "in the manner or occasion of doing it, provided it is done "boni fide in the prosecution of his business, and within the "scope of the servant's express or implied authority, and "not from mere caprice and wantonness and wholly outside "the duties imposed upon him by the master."

Wood's Law, of Master and servant, Sec 288.

The trial court, in its opinion said he could not hold "that defendant's duty in respect to the mail-sack under "the circumstances required that the station agent should "sit on the mail-sack the balance of the night and keep "awake." (Trans. p. 29).

It cannot be claimed that it was literally necessary for the night operator to actually sit on on the mail-sack, but we cannot and do not concede that, when the only protection furnished by defendant in error for the mail-sack, and valuable packages therein contained was the personal supervision and vigilance of its night operator, defendant could permit such mail-sack to be at any time without his personal supervision, without the defendant in error being negligent. And if the night operator in violation of his duty and instructions left said mail-sack so that it was not

under his personal supervision, then said night operator was negligent, and, if the rule of respondeat superior applies, defendant in error is liable for such negligence in this case.

As was said in the case of *Bolan v. Williamson*, concerning the deputy postmaster, Chapman, "the presumption is therefore that the money must have been taken out of the letter by some one who had access to the office before the mail was closed and although there is not any imputation against Chapman's honesty yet by his negligence it might have been lost or taken out by dishonest persons who got admission by some means into the post-office." (p, 554.)

2 *Bay* (*S. C.*) 551; *Bolan v. Williamson.* (1804.)

It is admitted by the demurrer that the mail-sack contained the registered package in question, when said mail-sack was delivered to defendant's night operator at Harvey, that the mail-sack was opened by some person with a false key in a room in the depot belonging to defendant in error, in which said mail-sack had been placed by said night operator, and that said room was not designed for safely keeping valuable articles or property.

If the mail-sack had been in the same room with the night operator and under his continuous supervision the loss of the registered package in question would have been impossible, and such loss is therefore attributable to the negligent failure of said night operator to naintain an adequate watch over or supervision thereof.

Reasonable care and vigilance on the part of the night operator would have prevented the robbery of this package, notwithstanding the fact that the defendant in error had failed to furnish any adequate and safe place in which to keep said mail-sack under lock and key or other secure fastening.

"If there was evidence tending to show that the defendant was thus negligent in more ways than one, it was not incumbent upon the plaintiff to satisfy the jury of the one particular act of negligence which led to the loss, or to show who got the money. It was sufficient that the jury was reasonably satisfied that the defendant did not exercise that care and prudence in the discharge of his duties in regard to the letters as a reasonable and prudent man would in regard to his own business, and that such neglect was the cause of the loss or injury."

97 *Ala.* 710; *Raisler v. Oliver.* (1893.)

It is certainly not necessary to allege that which need not be proven on the trial.

DIVISION IX.

IS DEFENDANT IN ERROR EXEMPT FROM THE RULE OF RESPONDEAT SUPERIOR?

The precise questions for determination in this case have not been decided by this or any other Federal Court, prior to this case, so far as counsel have discovered.

At the outset, we concede that Congress has the fullest and most ample authority to select the means of carrying out the powers conferred upon it by the Constitution and to prevent any interference with the execution of those powers and the means, instrumentality or agency employed by the government to effectuate them, including any interference with or obstruction to the person, natural or artificial, designated or selected in accordance with law for that purpose and without regard to the nature of the relation of such person to the government.

We deem it proper to state at the commencement that defendant in error is a State corporation carrying the mail upon notification from the Second Assistant Postmaster General, and that defendant in error was not created as a corporation by Act of Congress, nor had it any Federal franchise nor did it receive any aid or subsidy from Congress.

The court below does not deny and we presume this court will hold as a matter of course that being a public officer or public agent will not relieve defendant in error from responsibility for the acts or negligence of its own private agent or employee to whom it entrusts the performance of a public duty which by law or contract it is bound to perform. The defendant in error is liable if Magson was the private agent or employee in handling the mail as provided by Sec. 713, Postal Regulations Ed. 1893. Defendant in error at the most can be relieved only when Magson is held to be a public officer or agent.

The Circuit Court of Appeals, as its sole ground of decision in this case, and the trial Circuit Court as one of the grounds of its decision, **held that defendant in error, when carrying the mail, was a principal public agent of the United States, and that Magson, the night agent, an ordinary unsworn employee of defendant in error, when in charge of the mail, was a subordinate public**

agent or employee of the United States; and that such principal public agent was exempt from liability for the default, negligence or misfeasance of its said subordinate while so engaged, and in this respect had the same exemption as a principal public officer of the United States.

Under the facts of this case we claim that these decisions are erroneous in holding that either the railway company or its employee or either of them when caring for the mail are public agents of the United States, and in holding that a principal public agent other than a public officer, or that one performing a statutory duty under acts of Congress, are either of them exempt from liability under the rule of respondeat superior, because this exemption exists only under the following conditions.

First: When a public officer or agent, under duty bound to perform a public service, causes or permits such service to be performed in fact by the hand of his own private employee or servant, he is responsidble for the acts or omissions of that private employee under the rule of respondeat superior.

Second: To entitle a principal public officer or agent to exemption from liability under the rule of respondeat superior, such principal public officer or agent, and his subordinate in the public service must each be known to and derive his appointment from the law. Each must be in the employ of the government. A railway company carrying the mail is not appointed or elected under any law. If the designation of a railway company to carry the mail, by law and by the notification of the Second Assistant Postmaster General, be held equivalent to an appointment, nevertheless its ordinary employees are its mere private servants, employed, directed and discharged at its will, without any power or authority of any officer of the United States to employ, direct or discharge them. Such employees are not agents or employees of the United States, in any sense whatever.

Third: Such principal public officer or agent and his subordinate in the public service must each be qualified as provided by law. The demurrer in this case admits that neither the railway company nor its night station agent, Magson, was sworn into the postal service. The railway company, as a mere legal entity was incapable of being sworn, and there is no provision for a substituted oath to be imputed to a railway company carrying the mail. The statutes intend that the postal oath is not to be administered to a railway company before performing

its duties in the carriage of the mail. The statutes also intend and Postal Regulation, Sec. 713, Ed. 1893, expressly states that a railway employee performing the service in question "need not be sworn as employees of such service" and "are agents of the companies and not employees of "the postal service." The postal oath is required to be administered to "all persons employed in the postal serv-"ice." If not in the postal service, of course neither employer or employee need take the postal oath.

Fourth: The compensation of such principal public officer or agent and of his subordinate in the public service must as to each be authorized or provided for by law, whether in the form of salary paid or fees collected; the amount and time of payment being fixed by law. If it be held that the compensation of a railway company for such services is fixed by law and the orders of the Postoffice Department, yet the wages of an ordinary unsworn employee of a railway company caring for the mail, are fixed by the railway company, or by contract between such company and its employee, and are not fixed by law. Such wages are paid from the ordinary revenues of the company.

Fifth. Public officers or agents, principal and subordinate, must, while performing services for the government, be exclusively engaged in such public service. A governmental agency which combines its private welfare or advantage with the performance of its governmental functions is subject to the rule of respondeat superior. A railway company ordinarily carries mail on the same train with passengers, express and baggage, and a railway company and its ordinary employees concerned in the operation of such train, are working at all times for the pecuniary profit and benefit of such company, and any advantage derived by or service performed for the public, is merely incidental to and a part of its main business, as a corporation for pecuniary profit.

Sixth. Exemption from liability under the rule of respondent superior does not depend alone upon the performance of a governmental function or of a service for benefit of the public, but upon the relation to the government of those, both principal and subordinate, entrusted with the performance of such duty or service together with the governmental nature of the duty or service in which such persons are exclusively engaged while acting for the government.

Seventh. Exemption from the rule of respondeat su-

perior is limited to the performance of those superior functions of the government which are entrusted to public officers. Other public agents of the government, and those otherwise performing statutory duties for the government, do not have this exemption, unless it is conferred upon them by legislative enactment, and there is no such enactment as to railway companies carrying the mail.

The subordinate being the private employee of the public officer, and not a subordinate public officer or agent, whose appointment is known to the law.

A public officer must be "known to the law;" whether a principal or subordinate officer, his appointment or election must be authorized by law, and the same must certainly be true as to any one claiming to be a public agent or public employee. The exemption in question is not given to the principal officer or agent unless his subordinate is also a public officer or agent.

In the Connecticut case of *Ely vs. Parsons*, defendant was a select man having charge of certain highways. He employed one Button to cut down trees and brush obstructing a highway. Button wrongfully cut certain trees, etc., on plaintiff's land, which were not obstructing the highway. Plaintiff sued for damages on this ground, and recovered. The Supreme Court held that Parsons was a public officer, but that Button "did not hold an office known to the law." That court also said: "We do not think that Button should be regarded as an inferior public officer or agent but rather was acting solely under the "defendant." Parsons was, therefore, held not exempt from liability, under the rule of respondeat superior, and the judgment was affirmed.

55 Conn. 83; Ely vs. Parsons (1887).

In the Alabama case of *Raisler vs. Oliver* (97 Ala. 710), the opinion says: "The exemption from liability of the postmaster for the "defaults and misfeasance of his clerks "and subassistants is available to the postmaster only in "cases where such clerks or subassistants are appointed in "pursuance of some law expressly authorizing it, so that, "by virtue of the law and the appointment, the appointees "become, in some sort, public officers themselves."

Also, **"A postmaster who employes a clerk or assistant, inde-"pendent of express authority, and who is paid out of his own salary or "means, is liable for the default or misfeasance of his clerk or assist-"ant, as any private person would be for the acts of his agent or em-"ployee. The doctrine of respondeat superior applies in such cases."**

97 Ala. 710; Raiser vs. Oliver (1893).

Mr. Minot, in the extract previously quoted, says: "On "the other hand if the subordinate be not a government "officer, but the superior's private servant, the maxim of "respondeat superior applies and the master is responsible "for his acts and defaults."

1 Minot's Institutes (2d ed.) p. 228; (3d ed.) p. 253.

Postal Regulations No. 713, quoted in division three (3) hereof requires railway companies to receive and deliver mail, at the classes of stations in question "at which *the "company has an agent or other representative employed.*"

This regulation clearly contemplates that the company is to act through its own agent or representative who is and continues to be an employee of the company. There is not the slightest suggestion that the agents and representatives of the company, thereby become agents or employees of the government. So as to prevent any misunderstanding on this point the regulation says that "the persons "employed by the railroad companies to perform such ser- "vice are agents of the companies and not employees of the "postal service, and need not be sworn as employees of "such service."

The law and this regulation are clearly framed so that the company shall perform these services for a designated compensation and shall use its own private employees in performing the services.

Mr. Thompson says: "The right to control the conduct "of another implies the power to *discharge* him from the "service or employment for disobedience; and, accordingly, "the *power to discharge* has been regarded as the test by "which to determine whether the relation of master and "servant exists."

Thompson's Comm. on Law of Negligence (1901 Ed.); p. 535, Sec. 579.

Magson was employed and subject to be discharged by and was under the exclusive control of the railway company. The government did not employ him. Magson was the mere private employee of defendant in error, and as to such private employee defendant in error was subject to the rule of respondeat superior.

Exemption of Public Officers from Respondeat Superior: It is settled law that a principal public officer is not liable for the default, negligence or misfeasance of his subordinate public officer or agent employed exclusively in the public service.

But such principal public officer is liable for his own personal default, negligence or misfeasance, which includes acts done by himself or by his direction, the appointment of proper subordinates, diligent supervision of his subordinates, the removal of incompetent subordinates, and furnishing proper appliances when it is his duty to furnish them.

2 *Cowper's R.* 754; *Whitfield v. Lord de le Spencer.* (1778.)

1 *Ld. Raymond's R.* 656; *Lane v. Cotton.* (1701.)

7 *Cranch* (*U. S.*) 241, (3 *Law* 329); *Dunlop v. Munroe.* (1812.)

12 *How.* 284, (13 *Law* 990); *Teal v. Felton.* (1851.)

127 *U. S.* 507, (32 *Law* 203); *Robertson v. Sichel.* (1887.)

184 *U. S.* 676, (46 *Law* 754); *Howord v. U. S.* (1902.)

2 *Blatch* (*U. S.*) 121; *Brissac v. Lawrence.* (1850.)

15 *East* 189; *Nicholson v. Mounsey.* (1812.)

10 *W. Va.* 19; *Tracy v. Lloyd.* (1877.)

We refer also to other cases cited in this and the following division of this brief.

The Qualifications of Public Officers and Agents: Concerning the qualification of public officers and agents, in the manner required by law, there are decisions upon the effect of a failure to take the postal oath. The act in force on that subject at the time effecting this case is set out in the third division of this brief. The demurrer admits that neither the defendant in error nor its employee, Magson, was sworn into the postal service. The Circuit Court and Circuit Court of Appeals held that this fact was immaterial.

On the other hand, in *Dunlap vs. Munroe*, this court said: "Now the distinction between the relation of a post-"master to *his own sworn assistant* acting under him, and be-"tween master and servant generally, has long been set-tled." (p. 269; Law p. 339). This evidently referred to the English cases of *Whitfield vs. De Spencer* and *Lane vs. Cotton*, cited supra, which were referred to in the briefs of counsel.

7 Cranch (*U. S.*) *268*, (*3 Law 329*); *Dunlop vs. Munroe* (*1812*).

In a Maine case it was said:

"Cargill not being under oath was wrongfully in care "of the office and the defendant knew it; he cannot, there-"fore, bring himself within the protection of legal princi-

"ples, nor avoid the influences of the maxim, that every man must draw his justice from pure fountains."

11 Me. (Fairfield) 495; Bishop vs. Williamson (1834).

In a Vermont case the opinion said: "But it does not "appear that any of these persons were appointed and "sworn as the defendant's assistants." (pp. 673; 675). The postmaster, defendant Smith, was therefore held liable for the negligence of his unsworn assistants.

23 Vermont 663; Christy vs. Smith. (1851).

In *Sawyer vs. Corse* the employee, Fleming, "took no "oath while in the employment of defendant." (p. 233).

The Virginia Supreme Court said: "But if a carrier "who has taken the oath required by the act of Congress "can be justly regarded as an agent and servant of the gov- "ernment and no longer the mere agent and servant of the "contractor. *A "carrier who has not taken the oath cannot "be so regarded, because the act requires that he shall take the "oath before he enters upon his duties.*" "As Fleming had "not taken the oath to perform his duties under Sawyer, "therefore it is not competent for Sawyer to shield himself "by alleging that Fleming was an agent and servant of the "government, and especially as it was a breach of duty in "him to allow a person who had not been sworn to carry "the mail. Act March 3, 1825. (p. 244)."

17 Gratt (Va.) 230; Sawyer vs. Corse. (1867).

In *Central R. and B. Co. vs. Lampley* there was no carrier or postal clerk on the train (p. 360); the conductor (p. 360) nor any other of the railroad company's employees was sworn as a postal official (p. 361), and the rule of the Virginia case above cited was followed. The extract previously quoted from this decision clearly recognizes the distinction between an ordinary unsworn employee of a railway company, engaged in his employer's ordinary business, while incidentally performing services in relation to the mail, on the one hand, and a duly sworn subordinate public agent or employee of the United States, on the other hand.

76 Ala. 366; Central R. R. & Bkg. Co. vs. Lampley (1884.)

See also:

35 Maine 586; Rounds vs. Mansfield. (1854).

15 L. R. A. (Mich.) 97; Trainor vs. Bd. of County Auditors. (1891).

As the United States statutes do not requre a railway company or its employees, or any of them, to be sworn,

when engaged in the transportation, care or custody of the mail, while all postal officials are required to be so sworn, this is strong ground for believing they were not intended to be public agents of the United States, as all of its public officers, agents and employees engaged in that service, are required to take an oath before entering upon the discharge of their duties. As neither did take such oath they have no right to claim to be duly qualified public agents.

Must be exclusively engaged in the public service: It is only one who is exclusively engaged in the performance of a public function while acting for the government or performing a service of benefit to the public, who is a public agent so as to be entitled to exemption from the rule of respondeat superior. Not that his entire time is to be devoted to the public service, but that while purporting to perform public functions he must then act solely and exclusively for the public benefit without profit or advantage to himself to be derived from the act performed, other than the salary or fees allowed by law.

The case of *Sawyer v. Corse*, (17 Gratt. 230), was an action against a mail contractor for the loss by its employee of a registered package. The effect of combining the ordinary business of a common carrier with its services rendered in the care and carriage of the mail was considered. The Supreme Court of Virginia said:

"But it has been held that where the authority, though "for the accomplishment of objects of a public nature and "for the benefit of the public, is one from the exercise of "which the corporation derives a profit, and where the "duty though of a public nature and for the public benefit "may fairly be presumed to have been enjoined upon the "corporation in consideration of privileges granted to and "accepted by it, the exemption does not apply. And the "reason is that, in such cases, the corporation is not act-"ing merely as an agent of the public and with a view "solely to the public benefit, but that in the former it is "pursuing its own interest and profit, and in the latter is "executing a contract for which it has received a consider-"ation" Citing cases. (p. 241.)

16 *Gratt.* (*Va.*) 230; *Sawyer v. Corse.* (1867.)

The Supreme Court of Alabama accepts and concurs in the principles enunciated in *Sawyer v. Corse.* Concerning a railway company and its ordinary employees, both engaged in the usual business of said company, while performing services in relation to the mail that court said:

"The regular and usual business of the defendant was "a carrier of passengers and goods. Its railroad was, by "law, an established post road; and *by direction of the Post-"office Department*, was carrying the mails between Eufaula "and Clayton. The agents and servants of the trains were "not employed for the special business of transporting the "mails. They were employed in the general business of "transportation, and under said employment, were used in "the incidental service of carrying the mail matter. Being "thus generally engaged, and rendering such general "service, as the private agents and servants of the defend-"ant, the incidental service in carrying the mails does not "impart to them the charanter of public agents and "servants." (p. 366.)

76 *Ala.* 337; *Central R. R. & Bkg. Co. v. Lampley.* (1884.)

The same rule is announced as to a city combining private advantage with the performance of its public functions.

In the *Croton dam* case, entitled *Bailey v. Mayor, etc., of New York*, (3 Hill 631,) plaintiff sued for damages to his property caused by the unskillful erection by defendant city, of a dam 150 feet beyond the usual ordinary height of the water in the Croton river, which dam was destroyed by said water, and great damage was thereby done to plaintiff's property adjacent thereto.

Plaintiff offered to prove that the dam was negligently unskillfully and carelessly constructed, which was excluded by the trial court. (p. 535.) Plaintiff was nonsuited and moved for a new trial on a bill of exceptions. (p. 535.) Reversed.

The water commissioners having charge of the work were not appointed by the defendants but by the State, and it was contended they were not agents of defendants; that their functions were governmental, and, that the principle of respondeat superior did not apply. After an examination of the Session Law of 1834, p. 451, the Supreme Court held that: "by accepting the charter, the de-"fendants thereby adopted the commissioners as their own "agents to carry on the work. The acceptance was entirely "voluntary." (p. 543.)

The court further held that: "The powers conferred by "the several acts of the legislature authorizing the execu-"tion of this great work *were not, strictly and legally speak-"ing, conferred, for the benefit of the public. The grant is a "special, private franchise, made as well for the private emolu-*

"*ment and advantage of the city, as for the public good.* The "state in its sovereign character has no interest in it. It "owned no part of the work." (p. 539).

After considering a blending of powers granted exclussively for a public purpose with those powers conferred upon the corporation for private advantage and emolument, and holding that the distinction is quite clear and well settled, and the process of separation practicable (p. 539), the court said:

"But if the grant was for the purpose of private advan- "tage and emolument, though the public may derive a com- "mon benefit therefrom, the corporation *quoad hoc*, is to be "regarded as a private company. It stands upon the same "footing as would any individual or body of persons upon "whom the like special franchise had been conferred." (p. 539).

The Court recognized the rule that if the commissioners had been acting solely for the state, even if they were defendants' agents, then defendants would not be responsible for the conduct of those necessarily employed by the commissioners, if they were not chargeable with any want of diligence in the selection of agents. "They (defendants) "would then be entitled to all the immunites of public offi- "cers, charged with a duty, which, from its nature, could "not be executed without availing themselves of the ser- "vice of others, and the doctrine of respondeat superior does not apply to such cases." (p. 538).

3 Hill (N. Y.) 631; Bailey vs. Mayor and City of New York. (1842.)

The same case was subsequently before the Court of Appeals under the title of *Mayor, etc., of New York vs. Bailey*, (2 Denio 433) a verdict for over $62,000 having been rendered in favor of plaintiff on a retrial of the case. The learned Chief Justice could not agree that the commissioners in charge of the erection of the erection of the dam, under appointment by the State, were agents of the city, and concurred in an affirmance on other grounds; nevertheless the Senator who, as a member of that court, wrote one of the majority opinions, distintly asserted the doctrine above stated as one of his grounds of affirmance. The reasons for affirmance held by the other members, constituting a majority of the court, are not stated.

2 *Denio* 433; *Mayor and City of New York v. Bailey.* (1845.)

The same doctrine was subsequently announced by that court in *New York L. & S. M. Co. v. City of Brooklyn*, (71 N. Y. 580,) decided in 1878, wherein the Court of Appeals held that: "A municipal corportion is held liable for "the acts of an agent it employs to do business for its own "corporate or private benefit, the same as a private in- "dividual, and this, although the agent may be appointed "by the legislature or under legislative authority, if it ac- "cepts and ratifies the appointment." (p. 584.)

71 *N. Y.* 480; *N. Y. L. & S. M. v. City of Brooklyn.* (1878.)

To the same effect see:

17 *Gratt* (*Va.*) 375; *Richmond v. Levy.* (1867.)

The general rule in relation to muncipal corporation is stated in the *Am. & Eng. Enc. of Law*, thus: "But where "the act of its officers is committed in the performance of "some municipal or corporate duty which is private in its "nature, the corporation is liable."

19 *Am. & Eng. Enc. of Law*, (1*st ed.*) 514; title, "Public Officers," says: "persons acting for their own benefit, or "employing others for their own benefit," are not entitled to the exemption in question.

Story on Agency (9*th ed.*); *sec.* 321.

The liability of defendant as a principal, under the rule of respondeat superiar in the railway mail clerk cases, and the cases of injuries by mail-sacks could be sustained on this principle, that the railway company was not exclusively employed in the public service, but was transacting its ordinary business for its private advantage, as well as carrying the mail and was therefore a principal as to its employees and liable as such, but was not exempt as an intermediate or principal agent.

National and state sovereignties engaging in the banking business, by becoming the owners of capital stock or shares in banking corporations, lose their immunity from suit, in relation to the affairs of such bank. On this subject, speaking by *Mr. Chief Justice Marshall*, this court said:

"It is, we think, a sound principle, that when a Govern- "ment becomes a partner in a trading company, it *devests* "*itself*, so far as concerns the transactions of the company, "*of its sovereign character, and takes that of a private citizen.* "Instead of communicating to the company its privileges "and prerogatives, it descends to a level with those with

"whom it associates itself, and takes the character which "belongs to its associates, and to the business which is to "be transacted. Thus, many states in this Union who have "an interest in banks, are not suable even in their own "courts; yet they never exempt the corporation from being "sued. The State of Georgia, by giving to the bank the ca- "pacity to sue and be sued, voluntarily strips itself of its "sovereign character, so far as respects the transaction of "the bank, and waives all the privileges of that character. "As a member of a corporation, a government never exer- "cises its sovereignty. It merely acts as a corporator, and "exercises no other power in the management of the affairs "of the corporation, than are expressly given by the incor- "ating act."

"The Government of the Union held shares in the old "bank of the United States; but the priviliges of the govern- "ment were not imparted by that circumstance to the bank. "The United Statks was not a party to suits brought by or "against the bank in the sense of the constitution. So "with respect to the present bank. Suits brought by or "against it are not understood to be brought by or against "the United States. The government, by becoming a cor- "porator. lays down its sovereignty, so far as respects the "transactions of the corporation, and exercises no power "or privilege which is not derived from the charter."

22 *U. S.* (9 *Wheat.*) 904, (6 *Law* 244): *Bank of the U. S. v. Planters Bank.* (1824)

The foregoing decision must be considered in connection with the prior holding of this court that the power to organize a banking corporation was a means Congress might adopt for carrying out the the powers confered upon the Congress.

4 *Wheat*, 400, (4 *Law* 600): *McCulloch v. State of Marytand*, (1819).

In *Cooke v. United States*, (91 U. S. 1 Otto 389), this court said:

"Still a government may suffer loss through the negli- "gence of its officers. If it comes down from its position "of sovereignty, and enters the domain of commerce, it sub- "mits itself to the same laws that govern individuals there. (p. 398, Law p. 243).

91 *U. S.* (1 *Otto*) 389, (23 *Law* 243); *Cooke v. U. S.* (1875).

It appears to us that these decisions could also be sustained on the ground that the government is combining

private business with its governmental functions, and in such cases is liable so far as relates to the business of the banking corporation the same as any other person transacting like private business *in connection with* the performance of services of benefit to the government or the public.

It is therefore clear that a public officer has no *immunity* or exemption from any suit founded upon his liability as a principal for his own misconduct nor for the acts or omissions of his private agents or employees under the rule of respondeat superior.

The case of *Mersey Docks v. Gibbs*, decided in 1866, as we understand it, established two other important propositions on the subject of public agency:

First: That exemption from liability under the rule of respondeat superior, is one which pertains only to public officers and that the trustees organized as a corporate body considered in that case, were not public officers in that sense, and therefore not entitled to the exemption in question.

Second: That this particular exemption from liability does not exist in favor of persons, other than public officers, performing services of benefit to the government, unless granted by legislative enactment, and that the Acts of Parliament under consideration. did not grant such exemption, and therefore the liability of the trustees as a principal under the rule of respondeat superior, was in full force in that case.

In the *Mersey Docks* case the form of organization, powers and duties arose and was continued under Acts of Parliament, with power to sue and be sued.

A ship belonging to defendant in error was damaged by running aground on a bank of mud in the docks, where the channel had not been kept clear, because of the fault of a subordinate, the harbor master charged with that duty. Defendant in error, Gibbs, sued the trustees of the docks for damages resulting from said grounding of his ship, and recovered judgment. Affirmed.

The House of Lords held (10 & 11 Vict c. 27, Act 1847. pp. 525-6; pp. 704-5),

The true rule of construction is said to be: "*That the legislature intended* that the liability of corporations thus "substituted for individuals should, to the extent of their "corporate funds, be coextensive with that imposed by the general law on the owners on similar works." (p. 527 p. 706.)

"And we cannot think that it was *the intention of the "legislature* to deprive a ship owner who pays dues to a "wealthy trading company, such as the St. Catharine Dock "Company. for instance, of all recourse against it, and to "substitute the personal liability of a harbor master, no "doubt a respectable person, in his way, but whose means, "generally speaking, would not be equal to more than a very "small percentage of the damages, where there are any." (p. 539: p. 724).

"We agree with the Court below in thinking that since "the case of *Gibbs v. the Mersey Docks*, we must hold the "funds of this corporation (though established for public "purposes) liable to make good the damages sustained by a "private person from any breach of duty on their part, and "that *there is nothing in the Statutes to exempt this corpora-"tion from the duties which the common laws would cast upon "a private person or trading corporation.*"

43 *L. J. (Exch. App.)* 172; *Winch v. Thamee Conservators.* (1874.)

So in *Hall v. Smith*, decided in 1824, it was said: "The "maxim of respondeat superior is bottomed on this prin-"ciple, *that he who expects to derive advantage from an act, "which is done by another for him, must answer for any in-"jury which a third person may sustain from it.*"

Cases refusing the exemption to mail contractors: The decisions of State Courts on the subject of respondeat superior, as applied to mail contractors or railway companies carrying the mail are conflicting. Those refusing the exemption from this rule are:

17 *Gratt (Va.)* 230; *Sawyer v. Corse.* (1867.)

76 *Ala.* 357; *Central R. R. & B. Co. vs. Lampley* (1884.)

We have occasion to call further attention to these cases in a subsequent part of this division of our brief, and will make no further reference to them here.

Three decisions of State Courts granting this exemption to mail contractors are subsequently considered in this division of our brief.

Text writers: The subject of exemption from liability, under the rule of respondeat superior, of commissioners and trustees is considered in;

Shearman & Redfield on Negligence, (*5th ed.* 1898): *Sees.* 326-328.

Concerning the liability of a so called public agent or

of one performing a public duty, other than a public officer for the default, negligence or misfeasance of his subordinate private employees we find the following text book authorities:

Mr. Wharton, after stating the exemption of public officers from liability under the rule of respondeat superior, as above stated, wrote:

"Sec. 550. It has been held that the trusees of public "works (whether controlled by the state or by a corpora- "tion) are not liable for the torts of subalterns, supposing "there be no *culpa in eligendo. But the better opinion is that "such trustees, even though their services be gratuious, are "liable in all cases in which private persons, mutatis mu- "tandis, would be liable.*"

Wharton on Agency, (1876 *ed.*); *p.* 364, *Sec.* 550.

Mr. Minot says: "When the subordinate is himself a "*government officer* (in contradistinction to a *private servant* "of the superior), whether nominated by the superior or "not, the latter is not responsible for the subordinate's "acts or default, such subordinate not being an agent of "his, but of the government. On the other hand, *if the sub- "orditate be not a government officer, but the superior's private "servant*, the maxim of respondeat superier applies and the "master is responsible for his acts and defaults."

1 *Minot's Institutes*, (2*nd ed.*) *p.* 228; (3*d ed.*) *p.* 253.

In the Federal Courts, we have not discovered a single case prior to this action, in which exemption from liability, under the rule of respondeat superior, has been adjudged in favor of a public agent, who was not a "Public Officer". Nor do we find any American case establishing this exemption, except as to one adjudged by the court to be a public officer.

Injuries to railway mail clerks: R. S. Sec. 4000 previously quoted imposes upon railroad companies the duty of carrying the mail and the person in charge thereof. These duties as to the property and person are established by the same statute in identical terms.

In the succeeding division of this brief, (Div. VI), we refer to a number of cases decided by Courts of last resort of different States, holding railroad companies liable for personal injuries caused to railway mail clerks through the default, negligence or misfeasance of the employees of said companies, and in such cases the rule of respondeat superior is applied.

Under an English statute, identical with R. S. Sec. 4000, the railroad company was held liable by the Court of Queen's Bench, sitting in Banc with four Justices, for an injurp to the person of a railway mail clerk, caused by the negligence of the company's employees. The case (*Collect v. London & N. W. Ry. Co.* 30 Law Jour. 411: 16 Q. B. 984. 1851.) is referred to in the succeeding division of this brief; (Div. VI).

We also call attention, in the division of this brief, to cases decided by State Courts of last resort where railroad companies have been held liable under the rule of respondeat superior for injuries to third persons caused by mail sacks, and where, under the same rule, a mail-subcontractor is held liable for an injury to a mail transfer clerk.

The liability, under the rule of respondeat superior, for injuries to a railway mail clerk, announced in the cases above referred to, cannot be sound if a corporation, as a principal public agent, carrying the mail clerk, has the same exemption from liability which a principal public officer enjoys, because a principal public officer is not liable for *any* default, negligence or misfeasance of his subordinate, whether it results injury to the person or property.

It is suggested in the opinion of the learned Circuit Judges, concerning railway mail clerks, that: "As to the "safety of the persons of such clerks the railway company "*assumes the same duty* which rests upon it respecting other persons lawfully being carried on its trains." (Trans p. 28; 113 F. 416.)

This must mean that a railway company carrying the mail, as a principal public agent, has only one-half of the complete exemption from liability, under the rule of respondent superior, which a principal public officer has. It is half liable and half exempt from liability under the rule of respondeat superior; it is liable under the rule, if the injury is to the person; it is exempt from liability under the rule, if the injury is to property. But the exemption is an entirety, and the duty to carry safely both the person and the property arises from the identical terms used as to each in the same statute.

But no case decided by any Court of last resort, that we have discovered, suggests a possible division of this ground of liability, or exemption therefrom. The rule as a whole applies, or the person is wholly exempt from the rule.

The source and nature of the duty to carry the mail

and the mail clerk is the same federal law; the duty is identical—to carry safely. The degree of care required as to persons and property may be, and probably is, different, but all of these matters are of no consequence, if the negligence of the employee, as a matter of law, cannot be charged or imputed to the principal agent, the intermediate agent, who is exempt from the operation of the rule of respondeat superior. The duty at such time is one resting on the employee alone, who performs the act. It is not a question of the duty of the principal agent. but one of his exemption from liability for what another has done or omitted.

While the Circuit Court of Appeals did not specially refer to the law or authorities on the subject of railway mail clerk, their holding is, as we understand it, that a principal public agent stands on exactly the same footing as a principal public officer, and is completely exempted from liability under the rule of respondent superior.

Contractors with the government are subject to the rule of respondeat superior as principles.

1 *Shearman & Redfield on Negligence*, (*5th ed.* 1898); *Sec.* 325, *p.* 557.

110 *Fed.* 545, 550; *Harrison v. Hughes.* (1901).

34 *N. Y.* 389; *Robinson v. Chamberlain.* (1866).

Whatever may be the effect upon the government of entering into a contract, we are not concerned with that here.

The other party to the contract is not an agent of the government, his interests are adversary to the government. His employees are not in the employ of the government. As to such employees the contractor is a principal. There is no question of agency involved; the contractor is not an intermediate agent but a principal: he is not exempt from, but is subject to liability, under the rule of respondeat superior, precisely as if his contract had been made with any other person, or with a corporation, not governmental.

The mere fact that practically all railway companies are carrying mail, and from time to time carry troops, munitions of war and government supplies does not relieve them from liability under the rule of respondeat superior, for damages caused to persons or property, through the default, negligence or misfeasance of their employees, either in the performance of the corporation's duty as a common carrier of freight or passengers, or for injuries to third per-

sons or their property caused by the negligent operation of the railroad, even if the injury is caused by a train carrying the mail. The decisions of this character are numerous.

The general rule as to private corporations owning public works and operating them for a profit, is, that they are liable for torts and are subject to the rule of respondeat superior.

Mr. Jaggard says: "The authorities are generally "agreed that a private corporation owning public works and "operating them for profit, is liable in tort, as any other "corporation, for breach of corporate duty."

I *Jaggard on Torts*, (1895 *ed.*); *p.* 184, *Sec.* 61.

Natural Persons as public agents of the United States: We have found much difficulty in ascertaining what natural persons are really "public agents" of the United States, as distinguished from its "public officers." The word "agent" is used frequently in the Statutes of the United States and in the Regulations of the Executive Departments. Yet, after a deligent and extensive examination, although we can not claim it is exhaustive, we have been unable to find a single instance of a natural person, who is *a principal public agent*, having subordinates under him, as distinguished from a public officer, on the one hand, and a mere clerk or employee, on the other hand.

If every position in the United States government created by Congress and filled by the President by and with the advice of the Senate, or by the President, or by the head of a Department or by a Court of Law, is constitutionally a public office, no matter what it may be termed by Congress or by an Executive Department, natural persons as "public agents" are few in numbers and insignificant in their functions, and are persons who are required personally to fulfill the duties of the position, and are without any subordinates.

The term "agent" is used in the Statutes of the United States mainly with relation to those performing fiscal or financial duties or in making examinations of accounts; but in a large number of cases, these so called "agents" are regular superior or inferior officers of the United States assigned or detailed to perform these duties, as agents.

It will be seen that instances of *natural persons as agents* of the government having subordinates under them, so as to make them "principal public agents," are certainly quite rare, if any such have existed or do exist.

While the term agent does not appear to us to be used by Congress or the Departments with any degree of technical accuracy, yet there seems to be a well defined idea that there is some material difference between a public officer and a public agent.

The Law of Private Agency as applied to Public Agents: The appointment or election, rights, powers and duties of public agents are constitutional or statutory.

The application to public agency of the law which governs and controls private agency, is not technically accurate. The term public agent itself, although a very convenient one, and its use well established, is not strictly or technically correct.

The rule of respondeat superior is itself the outgrowth of public policy, and its application is superseded with reluctance and only in case of a clearly paramount and superior public policy.

While the line of distinction between the different degrees of public officers, public agents and public employees is probably not capable of exact definition, the gradations being so complicated and refined, in the case at bar it is certain that defendant in error, the railway company, is not a public officer, and is not entitled to rights and exceptions as such.

If defendant in error is held to be a public agent, the application to it of the rule of respondeat superior does not necessarily affect or interfere with its performance of the function or duty of carrying the mail assigned to it. Indeed the application of that rule would tend to produce, on the part of the railway company which is the one financially benefitted by the transaction, greater care and less negligence, which was the very object and purpose of the rule.

Neither defendant in error or its employee took any oath, gave any bond or was subject to any criminal statute. The employee is necessarily one of small, if any means, subject to execution.

A knowledge on the part of defendant in error and of its employees that there is no liability on the part of either to any one, no matter how carelessly or recklessly the employee cares for or handles the mail-sack and its valuable contents must tend to cause the very evils that the rule of respondeat superior was established to check and minimize.

It was suggested by counsel for defendant in error, in the Circuit Court of Appeals, that to hold defendant in er-

ror subject to the rule of respondeat superior would tend to increase to the government the cost of carrying the mail.

But the government pays to have the mail properly and carefully carried, that is,—carried safely. The railroad companies of the United States would certainly have poor standing in the halls of Congress and one without justice in a Court of law or equity when attempting to assert that the government must increase the amount paid for carrying the mail so as to compensate the companies for losses sustained through the negligence of their own employees, although, if there had been no negligence the compensation paid would have been adequate. This would be asking pay for negligence not for services rendered.

Three Contract Cases: We now desire to call attention to the cases of *Conwell v. Voorhees*, 13 Ohio Rep. 532, decided in 1844; *Hutchins v. Brackett*, 22 N. H. (2 Foster) 252, decided in 1850; *Foster v. Metts*, 55 Miss. 77, decided in 1877.

Each of these cases holds that a mail contractor is not liable for a loss of mail occasioned by the negligence of an employee of such mail contractor. and places a mail contractor on the same footing as a Postmaster, or other public officer.

Each of these cases was decided before the Sections 713 and 1023, Postal Laws and Regulations, 1893, were established in their present form, and without the effect of the provisions of these Sections upon the mind of either Court when rendering the decisions. These decisions are not precedents or law in the face of these Postal Laws and Regulations; nor are they sound expositions of the common law, independent of the above mentioned statutory provisions.

In the Ohio case of *Conwell v. Voorhees*, the opinion states that: "The mail contractor is *a sworn officer paid by "the government.*" (p. 542. * ""So far then as the trans- "mission of the mail is concerned, a mail contractor is a "public agent, and as such, only responsible." (p. 542.

13 *Ohio R.* 523; *Conwell v. Voorhees.* (1844).

In this and many other cases the terms "sworn officer," "public officer" and "public agent" are used very indefinitely and apparently as synonymous terms. An examination of the whole opinion shows that it is the manifest intent of the Court to declare a mail contractor to be a "public officer" and to give him the same exemption as a Postmaster is entitled to as a public officer. The fundamental

error lies in holding the mail-contractor to be a "public officer."

It will be observed that the "*Conwell*" case was decided in 1844, almost a quarter of a century before this court in 1868 in *U. S. v. Hartwell*, (73 U. S. 385,—18 Law 830), finally settled who was and who was not a "public officer" under the Constitution of the United States. The Ohio court was in error in holding that a mail-contractor was a public officer.

The fact that the only relation between the government and the contractor was contractual, under an express written contract, which alone defined the duties and rights of the contractor; that there was no agency for the government on the part of the contractor or of his employee and that the exemption from respondeat superior of an intermediate agent could not apply, is not considered by the Court.

In *Hutchins v. Brackett* (22 N. H. 252), the New Hampshire Supreme Court said: "We are not able to distinguish "*Conwell v. Voorhees* from this case. * He (the mail driv-"er Smith) takes an oath for the faithful discharge of his "duty, and is subject by law to various "penalties for viol-"ations of it." (p.256). * "We are, therefore, of opinion, "that the defendants cannot be charged in this action, be-"cause they are not liable for the defaults of Smith, their "subordinate public agent in the post office." (p. 256).

22 *N. H.* (2. *Foster*) 252; *Hutchins v. Brackett.* (1850).

The "*Hutchins*" case was also decided about eighteen years before the decision of the "*Hartwell*" case. The New Hampshire court accepts the decision in *Conwell v. Voorhees* as to the mail-contractor being a sworn officer of the government without discussing this proposition, and adjudged that the mail driver is "their subordinate public agent in "the post-office."

In *Foster v. Metts* (55 Miss. 77) the Mississippi Supreme Court followed *Conwell v. Voorhees* and *Hutchins v. Brackett.*

That court said:

"It (the government) carries them (the mails) by the "aid of agents it contracts with for the service. Contract-"ors for carrying the mails are the agents of the govern-"ment in the business undertaken by them. (p. 80.) Post-"masters are necessary agents for the performance of the "business of the Postoffice Department, and those who "carry the mail from place to place are equally necessary "and engaged in the business of the government. (p. 80.)

"The rider or driver employed by the contractor for carry-
"ing the mails is an assistant about the business of the
"government. (p. 80.) He is a *subordinate agent of the*
"*government*, whose employment is contemplated and pro-
"vided for by the government in contracting to have the
"mail carried." (p. 81.)

After referring to the exemption of *postmasters* from liability for their subordinates, the opinion says: "As re-
"marked before, carrying the mail is just as necessary, and
"as much a part of the business of the government, as the
"service rendered at the office *by postmasters*; and those
"employed about carrying the mails *are as much the agents*
"*of the government* as *are postmasters* and their clerks and
"assistants." (p. 82.)

55 *Miss.* 77; *Foster v. Metts.* (1877.)

Although decided in 1877, nine years after the *Hartwell* case, the attention of the Mississippi Court was not called to the *Hartwell* case, nor does that court appear to have been advised that this court had authoritatively settled the line of demarcation between public officers, and public agents other than public officers.

The opinion in the *Foster* case appears to use the words "public officer" and "public agent" synomyously and assumes that every public agent has the same exemption from liability as a public officer.

A careful examination of the *Conwell*, *Hutchins* and *Foster* cases above cited, shows very plainly that the distinction between public officers and public agents other than public officers, which is clearly recognized by eminent courts and text writers of distinction, is nowhere suggested or considered in any of these decisions. None of these cases is authority on the question here presented for consideration.

Another important legal principle is also overlooked in the *Conwell, Hutchins and Foster* cases. Public officers are agents of strictly defined and limited powers. The system of providing for the carriage of mail by contracts was so well defined and carefully elaborated by Acts of Congress in force when those cases were decided, which were, in the main repeated in the Revised Statutes of the United States in 1873 and 1878, that the intention of Congress to require the carrying out of this contract system was firmly established.

The officers of the United States entrusted with the power and duty of carrying out this contract system, could

not overthrow that system and establish one of agency in its place, there being no legislative sanction therefor. The limitation of the powers of officers empowered to make contracts are carefully considered in the New York case of,

95 *N. Y.* 572; *Seybolt v. N. Y. Railroad Co.* (1884.)

The legislative establishment of such system of contracts so clearly and unambigously expressed seems to us to be binding upon the Courts, and such legislation could not properly be construed into a system of agency.

It will also be observed that the opinions in the *Conwell*, *Hutchins* and *Foster* cases, above cited, profess to relate only to a mail contractor and his employee, when *both are duly sworn* into the postal service.

These decisions are criticised and disapproved generally by the text books and annotations and are in conflict with the better considered decisions.

After stating that contractors with the government are not public agents so as to exempt them from the operation of the rule of respondeat superior, *Shearman & Redfield* state that this rule applies to contractors for carrying the mail.

1 *Shearman & Redfield on Negligence*, (*5th ed.* 1898); *Sec.* 325, *p.* 557.

Mr. Mechem, in his work on Agency in the latter part of Sec. 574, says: "Whether contractors for carrying "the mails are public governmental officers within the "meaning of this rule, so as to be exempt from liability "for the default of their subordinates, is a question upon "which there is a conflict of authority, *but the better opin-*"*ion* is that they are not."

Mechem on Agency, *Sec.* 594.

Mr. Wharton, in his work on Negligence. says:

"Sec. 296: It has in some cases been broadly as-"serted, though for reasons by no means consistent, that "these officers are not liable for money lost through the "carelessness of their agents who carry the mail. On "the other hand, this has been disputed in a Virginia "case, distinguished for the ability with which it was "argued by the learned Judge who gave the opinion. In "that case it was held that a mail carrier is not an officer "officer of the government, but is the private agent of the "contractor for carrying the mail, and the contractor is "is liable to third persons for any injury sustained through "the negligence or default of such agent in the performance

"of his duties. It was further determined (and this may "enable us to reconcile this case with those elsewhere "cited), that the Act of Congress of March 3, 1825, re- "quires that mail carriers shall be sworn, and it is the duty "of the contractor to see that this is done. If the carrier "was not sworn, such was the conclusion, he is the private "agent of the contractor, for whose default the contractor "is liable to third persons, even if on being sworn the con- "tractor would not be liable for his acts."

Wharton on Negligence, (*2d ed.* 1878); *Sec.* 296, *p.* 267.

The decision in *Conwell v. Voorhees* is also commented upon and disapproved in the note following the report of that case in the American decisions, and the writer says concerning *Sawyer v. Corse*: "This seems, upon reason and "principle, to be the better doctrine and meets the approv- "al of the same able writers." (*Shearman v. Redfield*, Wharton and 1 Am. Lead cases).

42 *Am. Dec.* 208; *Note to Conwell v. Voorhees.*

The controlling authorities seem to overrule these few illy conducted cases.

In *U. S. v. Belew*, (2 Brock 280), it was held, in the opinion, by *Mr. Chief Justice Marshall*, that an individual carrier is "a person employed in any of the departments of "the general postoffice", under Sec. 18, Act of April 30th, 1810, regulating the Postoffice establishment.

The opinion says: "The first section of the act makes it the duty of the Postmaster General to provide for the "carriage of the mail on all post-roads that are or may be "established by law. The carriage of the mail, then, is a "part of the business of the Postmaster General; it is with- "his department of general postoffice."

Defendant's council insisted "he (defendant) must be an officer." The opinion said: "But this is not the object "of the law, the terms of the enactment do not require an "officer; they are satisfied with an agent, or any person "employed in any of the departments, or, in other words, "in the buisness allotted to the general postoffice. Nor do "they require that he shall be employed by the Postmaster "General, or by authority expressly delegated to him; it is "enough to satisfy the law that they are so employed."

2 *Brocken* 280; *U. S. v. Belew.* (1826).

DIVISION X.

SURROGATION.

"If insured buildings *or other property* be destroyed "through the fault or negligence of some person other "than the owner, the insurance company, upon payment, "will be subrogated to the right of the owner, to recover "from the wrongdoer. In such jurisdictions as have no "statutory provisions upon the subject, the action must "be brought in the name of the assured. In some juris- "dictions, however, it may be brought in the name of the "insurance company under statutes allowing actions to be "brought in the name of the real party in interest."

24 *Am. & E. Enc. of Law*, (1*st ed.*) *pp.* 306-308; *title*, "*Subrogation.*" 5*b.*

An insurer who has paid a loss caused by the negligent act of the railroad is entitled to subrogation, and may recover in its own name against the railroad company.

74 *Mo.* 106; *Hartford F. I. Co. v. Wabash Ry. Co.* (1898.)

50 *S. W. R.* (*Mo.*) 281; *Lumberman's M. I. Co. v. H. C. F. S. & M. Ry. Co.* (1899.)

See also:

80 *U. S.* (13 *Wall.*) 367, (20 *Law* 594); *Hall v. Nashville & C. Rd. Co.* (1871.)

129 *U. S.* 402, (32 *Law* 799); *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* (1888.)

Conclusion: Under the facts of the case at bar it is established:

That defendant in error was not exclusively engaged in the government service, or in carrying the mail, but was pursuing its ordinary business at a common carrier of passengers and freight, incidentally rendering a public service in carrying the mail in connection with such usual business.

That its employe, Magson, was engaged in his regular business as local night agent of defendant in error, performing duties for defendant in error, as a carrier of passengers and freight; whatever Magson did in relation to the care of the mail was merely incidental to his ordinary business as an employee of said company.

That neither defendant in error nor its employee had qualified for the postal service by taking the postal oath.

That an ordinary unsworn employee of a railway company is unknown to the law, and a mere private employee of the company, and not an agent or employee of the government. Magson was hired by the company, on such terms as were mutually satisfactory to himself and the company, and the government had no power to employ or discharge him. By section 713, Postal Laws and Regulations, 1893, he was an employee of the defendant in error, and not in the government service.

Magson's compensation was not paid by the United States, or from fees fixed by law, but from the ordinary revenues of the company, and at times agreed upon between them, and not fixed by law.

No relation between the railway company and the government or between Magson and the government existed, such as to relieve defendant in error from liability under the rule of respondeat superior.

No exemption of a railway company carrying the mail from liability under the rule of respondeat superior is given by any Statute of the United States, and the application of that rule to a railway company, carrying the mail, does necessarily affect the authority given by the government th said company, or in any manner interfere with the operation of said company in such service.

That Magson was the private employe of the defendant in error and not a government agent.

For these reasons, we claim that such railway company is subject to liability under the rule of respondent superior for the default, negligence or misfeasance of its private employees while employed or concerned in the care or carriage of the mail.

Respectfully submitted,

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As we understand this record, the defendant in his brief fails to comprehend the significance of the facts stated in our complaint, and which involve the construction of the Statutes and Postal Laws, as well as the validity of the latter. The complaint states the following facts, which so involve the statutes and laws:

"That during the whole year A. D. 1900, and up to the present "time, defendant is and was engaged in carrying the United States "mails between the terminal and intermediate stations located upon "and along its said line of railroad, under and by virtue of the "Statutes and laws of the United States, and the regulations estab-"lished by the Postoffice Department of the United States govern-"ment and in pursuance of a fixing of the compensation to be paid "to defendant by the United States government for carrying said "mails and the person in charge thereof."

"That said depot, at or near the town of Harvey, was an in-"termediate station on that part of defendant's said line of railroad "within the State of North Dakota, which extends from the sta-"tion at Hankinson to the station at Portal, and the railroad line "between said stations at Hankinson and Portal is designated by "and known to the Postoffice Department of the United States, as "Railroad Route No. 161,018."

"That during all of the period hereinbefore referred to, there "was no contract of any kind between defendant and the United "States government, concerning or providing for the carriage, by "defendant, of said mails, or any part thereof, or of the person in "charge of said mails, upon or along defendant's said line of rail-"way or any part thereof."

"That upon the arrival of defendant's said train and postal car "at said town of Harvey, North Dakota, said railway mail-clerk, or "other postal official, between eleven and twelve o'clock of said "night, delivered said mail sack, duly locked, together with said "registered package of currency therein contained to one James "Magson, the night station agent, or night operator of defendant at "said town of Harvey; that said night station agent, or night oper-"ator, was not sworn as an official or employe of the postoffice de-"partment of the United States government, as required by law, "but was then and there employed and duly authorized by the de-"fendant to receive and take charge of all mail matter received over "defendant's said line of railway, at said town of Harvey, includ-"ing the mail sack or mail pouch containing said package of cur-

"rency, and to deposit same in defendant's depot, at Harvey, North "Dakota, and did so receive, take charge of and deposit said mail "sack, or mail pouch. That defendant was not sworn as an official "or employe of the postoffice department of the United States gov- "ernment, and had not subscribed or sworn to any oath relating to "or concerning the carriage of the United States mails, or the per- "formance of defendant's duties as such carrier of the mails."

"The railroad company will also be required to take the mails "from and deliver them into all intermediate postoffices and postal "stations located not more than 80 rods from the nearest railroad "station at which the company has an agent or other representative "employed."

"That said postoffice at Harvey was an intermediate postoffice "and was located not more than 80 rods from defendant's railroad "station, or depot, at, or near said town of Harvey."

"That under said postal regulation it was the duty of said de- "fendant to provide a sufficient and safe receptacle or place for the "safety and security of said mail, while in its said custody; also to "safely care for and guard said mail sack and its contents during "the night; also to safely deliver the same to the postmaster or post- "mistress at the postoffice in said town of Harvey, North Dakota."

As we understand the law, it is the purpose of pleading to state the facts, and not conclusions of law, or the law itself. Our complaint does not copy the statute or laws of the United States verbatim, but does set out the facts on which we claim under an application and construction of the statute and laws of the United States. And we contend:

First, The defendant in error carries the United States mail by virtue of the acts of Congress, and the order of the Postmaster-General, issued by virtue of the laws of the United States. The cause of action in suit involves a construction of these statutes, and a determination of the duties of the defendant in error arising therein. The question of whether the relations between the defendant in error and the United States is one of contract is immaterial, because such contract, if any exists, consists of the laws of the United States only and the acquiescence of the defendant in error in the provisions of those laws, and in no way changes the statutes or laws themselves. The determination of the duty of defendant in error to plaintiff in error in this case is a construction of those laws.

Second. The validity of the postal laws, sections 713 and 1025, depend upon the authority of the Postmaster-General to so make and promulgate them, and directly involves a determination by this court of the authority of the Postmaster-General under the acts of Congress relating to that official. The two determining points in

the decision of the circuit court were, (a) that Magson was the agent of the government in so far as he handled the mail, instead of the agent or employe of the railroad company, as provided by section 713; (b) that the railroad company was not required to provide a safe place or room for keeping of the mail, as provided by section 1028 and the determining point of the circuit court of appeals (which in its discussion of the question ignored the second of above propositions, but did affirm it by its general order of affirmance) is that Magson, in so far as he handled the mails, was a government agent, instead of a railway employe, in contravention to section 713. These two questions depend upon, and directly involve, in effect denying the validity of said sections 713 and 1028 overruling and nullifying the acts of the Postmaster-General in their enactment.

Third. On page 11 of brief, Defendant in Error says: "4. The "patent questions arising in the suit disclosed by the amended com- "plaint as a whole, upon the decision of which the result depends, "are evidently these: Was the money lost by negligence? If so, "then was the relation between plaintiff, or its assignor, and the de- "fendant such that this action could be maintained?" We take direct issue with this supposition. These questions are involved in the case, and are admittedly common law questions, but they are secondary to the determining propositions of this case, for when we have determined both of these questions in favor of the plaintiff, by competent evidence, we would still fall far short of a complete cause of action. The responsibility of the defendant would still require a construction of the laws of the United States relating to the duties of the defendant to carry the mail safely, especially section 4000 of the revised statutes of the United States, and Postal Laws and Regulations, sections 713 and 1028 and there is no responsibility resting upon the defendant, excepting as imposed by those laws. Except for these laws of the United States the defendant would not be concerned with the mail and could owe no duty to any one interested in the mails.

Fourth. The complaint states that defendant was not sworn into the government, that Magson was the agent of the defendant and not in the government service. The demurrer admits that fact, and, therefore, as a common law proposition independent of the statutes of the United States and postal laws, and defendant would therefore be liable. Whatever relief the defendant has from this common law rule is by virtue of the laws of the United States.

We have carefully considered the cases cited in defendant's brief, and will briefly refer to them and attempt to show either that they are not applicable to the case at bar or that they uphold our contention.

Colorado Mining Co. vs. Truck, 150 U. S., 138.

The only question in this case was the question of the opposite parties being citizens of different states. This was the only question alleged for obtaining jurisdiction in the United States circuit court. Suit was brought for ejectment and damages, rents, profits, etc., of a mine. Judgment for plaintiff, and appeal dismissed.

Borgmeyer vs. Idler, 159 U. S., at 412.

Suit brought for claimed commissions, and money advanced in the prosecution of a claim against Venezuela. Parties were residents of different states, and that was the only jurisdictional question. Held that the decision of court of appeals was final; and other questions cannot be injected into case by argument or otherwise.

Louis Loeb vs. Trustees of Columbia Township, Hamilton County, Ohio, 179 U. S., 472.

Action brought to recover on bonds issued for widening and extending Williams Avenue. Defendant demurred, setting up three grounds. Overruled as to first and second, and sustained as to third. This ground was: "That the act contravened the provisions "of the constitution of the United States, and, therefore, bonds "were invalid." Appeal taken directly to the United States supreme court, which held, that although the jurisdiction of the United States circuit court was obtained originally by the diversity of citizenship, still when defendant set up a constitutional right, jurisdiction of the United States supreme court attached. Held, it would have been otherwise, however, (page 478) had plaintiff carried case to the Circuit Court of Appeals. At page 483 court says:

N. B.—"What was said in opinion * * * does not preclude "the court from looking into the opinion of the trial court for "any purpose whatever, as, for instance, for the purpose of ascer- "taining *whether either party claimed, in proper form*, that a state "law * * * was in contravention of the constitution of the "United States."

Same case, at page 483 says:

"Arguments of counsel form no part of the record."

Also (same page):

"The rule of our court referred to does not apply alone to cases "brought here from the highest court of the state. *It applies in "terms to all cases brought to this court by a writ of error or appeal.*"

At page 483:

"The result is that this court has jurisdiction to review the judg-"ment of the circuit court, *and determine every question properly* "*arising in the case.*"

American Sugar Refining Company vs. New Orleans, 181 U. S., 281-282.

"If case arises where it appears in the record from plaintiff's own "statement of the case * * * that the suit involves a dispute "or controversy as to a right which depends upon the construction "or application of the constitution, *or some law* or *treaty* of the "United States * * * (cases cited). These cases fall strictly "within the terms of Section 5. The appellate jurisdiction of this "court in respect to them is exclusive."

Also; if plaintiff by proper pleading shows the jurisdiction of the circuit court on diverse citizenship, *and also on grounds independent of that.* * * * and the case is taken to the court of appeals. Propositions as to the *latter* grounds may be certified * * * and an appeal or writ of error would be under the last clause of section 6, because jurisdiction would not depend solely on diverse citizenship. Citing:

Union P. Ry. Co. vs. Harris, 158 U. S., 326.

Huguelay Mfg. Co. vs. Galeton Cotton Mills, 184 U. S., at 295.

"If the jurisdiction of the circuit court rests solely on the ground "that the suit arises under the constitution, laws or treaties of the "United States, then the jurisdiction of this court is exclusive; but "if it is placed in diverse citzenship, *and also on grounds independ-*"*ent of that,* then, if carried to the court of appeals, the decision of "that court would *not* be final, and appeal or writ of error would be

Citing:

American Sugar Refining Co. vs. New Orleans, 181 U. S., 277; 45 L. Ed. 851.

21 Supreme Court Reporter, 646.
Memo.

In this case, diversity of citizenship was the only ground set out to show jurisdiction, and appeal was dismissed in United States supreme court.

Little York Gold Washing and Water Co., Limited, Plaintiff in Error, 96 U. S. 199-204, at page 658.

"It is well settled that in the court of the United States the special "facts necessary for jurisdiction must *in some form* appear in the "record of every suit, and that the right of removal * * * is "statutory."

Further on in same opinion, it says:

"*The office of pleading is to state facts, not conclusions of law.* "It is the duty of the *court to declare the conclusions,* and of the "*parties to state the premises.*"

In this case no *fact* was stated giving jurisdiction.

Ansbro vs. United States, 159 U. S., 695, not applicable.

Ansbro was convicted for discharging or dumping dirt or refuse within the harbor—adjacent water of New York City.

Held not an *infamous* crime, punishable by imprisonment in the penitentiary, it being a *misdemeanor* only, and United States court had no jurisdiction.

McCain vs. Des Moines, 174 U. S., 168.

Shows parties all residents of Iowa, and no constitutional question raised; also that matter had been previously passed upon by supreme court of Iowa in *State of Iowa (Ex rel West) vs. City ..of Des Moines, 96* Iowa, 521. A Quo Warranto case.

Starin vs. New York, 115 U. S., 248-247.

No question was stated showing a shadow of jurisdiction; a suit upon contract, etc., and petition dismissed.

NewOrleans vs. Benjamin, 153 U. S., 411-424.

Not applicable.

St. Joseph & Grand Island Ry. Co. vs. R. M. Steel, Sheriff Doniphan County, Kansas.

Citation in defendant's brief correct, but it was a case brought by a resident of Kansas against the railroad company substituting and created under the laws of Kansas and Nebraska and held not to be a "diversity of citizenship." (See page 663.)

Hanford vs. Davies, 163 U. S., 273-279.

Parties all citizens of the state of Washington and no constitutional question raised. Demurrer sustained and affirmed.

Western Union Telegraph Co. vs. Ann Arbor Ry. Co., 178 U. S., 239-243.

After stating what is in defendant's brief the court adds: (Page 244). "As we have said, it was not asserted in the argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute we could not permit such contention to be recognized as a basis of jurisdiction."

In answer to the cases referred to above, with the casual remarks attendant therewith, we again refer to the cases cited by plaintiff in error in brief, on pages 12 to 16 inclusive, which answers the proposition of defendant as fully as if their brief had already been served and filed when our brief was written.

The defendant makes great effort to convince this court that plaintiff's case did not involve a construction of the laws of the United States in the court below.

In the opening pages hereof we cite some of the statement of facts, the application of which to the issues of this case involve a construction of the laws of the United States, and the rights of this plaintiff depend upon the construction of the laws of the United States relating to carrying the United States mail, contended for by plaintiff, and the filing and submitting of the demurrer by defendant, admitted all the salient points that were well pleaded in plaintiff's complaint.

1st. That Magson was an employe of the defendant railway company by virtue of section 713 postal law.

2nd. That the defendant railway company did not furnish a safe room or apartment for the keeping of the mail, and were thereby negligent, by virtue of section 1025 postal laws.

3d. That they were carrying the mail under the provisions of act of Congress, and became responsible to the plaintiff for its safety, by virtue of section 4000, Revised Statutes.

It is true plaintiff did not cite the statutes relied upon in their numerical order in their complaint, nor copy same therein, but they are sufficiently referred to and cited to bring them to the court's attention, and were entitled to the proper consideration. In fact, we feel it would have been in bad form to set them out verbatim, they being propositions of *law* which should be construed and applied to them by the court.

We concede that the Circuit Court and Circuit Court of Appeals would take judicial notice of the laws and Postal Regulations of the United States, especially when their attention was called to them by reference.

By reference to page 21 of plaintiff's brief, we called attention of this court to the fact: "This court takes judicial notice of department rules and regulations."

Caba vs. United States, 152 U. S., 221.

"Such regulations when they have been recognized by congress, have the force of law."

"The regulation involved in this litigation is recognized by the act of Congress approved March 3, 1887."

MERITS OF THE CASE.

The action against defendant is based upon his tort in failing to carry the mail safely, and is in no way concerned with the relations between defendant and the government.

The case involves such common law questions as grow out of the acts of negligence complained of.

In addition, and necessarily involved in the solution, in so far as the responsibility of defendant for the United States mail, is concerned the construction of the laws of the United States.

At this time we will note the common law questions briefly.

The defendant cites a large number of cases brought on the theory that water companies were responsible for loss by fire when they failed to furnish water to extinguish such fires. Those cases are not applicable to this case.

It is true that the court also investigated the question of the contractual relations between the various water works companies and the municipalities, and properly found that the plaintiffs in those cases could not recover in actions based upon contracts to which they were not parties. But this was a secondary feature.

This case is not founded upon the relations between the government and the defendant, but upon the fact that the defendant failed to perform a statutory duty, and thereby damaged the plaintiff.

The determining question in water company cases cited by defendant is the holding now well established as law that the municipality or the water company, furnishing water to a municipality, is under no legal duty to so furnish water to individuals residing in the municipality to be used in extinguishing fires. Held, so failing to supply water is not a wrong or tort. Had the ruling established the reverse of the proposition as law, then such cases would be the same as the case at bar, and the defendants held liable.

Defendant calls attention to a case decided by the supreme court

of Iowa, *The Boston Insurance Company vs. The Chicago R. I. & Pac. Ry. Co.*, 92 N. W. Rep., 88, and seem to base some claim in the argument thereon. We ask the court to examine that case, and by so doing you will find that it involves but little, if any, of the legal propositions in this case at bar. In that case the action is based upon a state of facts substantially as follows:

The passenger train of defendant included a regular postoffice car, with the postal clerk therein on duty. The train was wrecked by an accident, the postal clerk killed, and the mail in the car, destroyed by fire, which occurred in connection of the accident.

At the time of the accident the mail was not in the custody and possession of the defendant, but in fact was in the actual custody and possession of the postal clerk duly sworn into the postal service of the United States. The mail not being in the actual custody or possession of the defendant their liability or non liability depends upon an entirely different legal proposition than the case at bar.

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